Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

B.R. GRIFFIN, DAVID H. HAWK, JAMES A. LYLE, HAYDEN McILROY and J.R. SIMPLOT,

*Petitioners,*

v.

THOMAS D. BOX and DON D. BOX, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF CLOYCE K. BOX, CKB & ASSOCIATES, INC., CKB PETROLEUM, INC., BOX BROTHERS HOLDING COMPANY and OKC LIMITED PARTNERSHIP,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

One question is presented:

1. Whether the Plaintiffs were denied their right to trial by jury under the Seventh Amendment to the United States Constitution when the Fifth Circuit Court of Appeals reversed the judgment rendered in Federal District Court on the grounds that the jury's answers on the special verdict form were inconsistent and could not be reconciled.

## PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit, the Opinion of which is here for review, were:

1. Petitioners B.R. Griffin, David H. Hawk, James A. Lyle, Hayden McIlroy, and J.R. Simplot, Appellants in Appeal No. 94-10348, and Appellees in Appeal No. 94-10943 in the Court of Appeals;

2. Thomas D. Box and Don D. Box, Independent co-Executors of the Estate of Cloyce K. Box, CKB & Associates, Inc., CKB Petroleum, Inc., Appellees in Appeal No. 94-10348 and Appellants in Appeal No. 94-10943; and

3. Box Brothers Holding Company[1] and OKC Limited Partnership, Appellees in Appeal No. 94-10348.

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[1] No judgment was entered against Box Brothers Holding Company at trial, and no relief is sought against Box Brothers Holding Company as part of this Petition for a Writ of Certiorari.

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## PETITION FOR A WRIT OF CERTIORARI

Pursuant to Part III of the Supreme Court Rules, B.R. Griffin, David H. Hawk, James A. Lyle, Hayden McIlroy, and J.R. Simplot petition this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit which, among other things, reversed the Amended Final Judgment of the district court on the basis of irreconcilable answers on special interrogatories, is attached hereto as Appendix A.

The United States District Court for the Northern District of Texas Amended Final Judgment, which granted judgment in favor of the Petitioners pursuant to special interrogatories answered by the jury is attached hereto as Appendix B.

## JURISDICTION

The Court of Appeals issued its Opinion on May 2, 1996. This Petition for a Writ of Certiorari is therefore timely pursuant to Sup. Ct. R. 13.1 and 13.4. This Court has jurisdiction to review the Opinion of the Court of Appeals under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

### SEVENTH AMENDMENT

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

## STATEMENT OF THE CASE

### FACTUAL BACKGROUND

Cloyce K. Box ("Box"), general partner of OKC Limited Partnership ("OKC"), wrongfully usurped a valuable partnership opportunity to purchase a lucrative interest in an oil pipeline on March 1, 1985. The pipeline was the sole means of transporting the OKC liquid hydrocarbon product from off-shore oil platforms to market. Box orchestrated the transfer of this interest to CKB Petroleum, Inc., a corporation which he controlled. Box used this self-dealing conduct to pay himself millions of dollars in salary from tariffs collected from OKC and paid to the corporation which he controlled. If OKC had been able to take advantage of this partnership opportunity, it would have been able to have transported its oil at a greatly reduced tariff figure, thereby deriving substantial savings and benefits to the limited partnership. On October 29, 1992, a jury in the United States District Court for the Northern District of Texas, Dallas Division, returned a verdict against Box and corporate general partner CKB & Associates, another entity controlled by Box, after a two-

month trial. The verdict in favor of Petitioners as derivative plaintiffs for OKC was primarily based upon damages to OKC as a result of the wrongful usurpation of the partnership opportunity. The jury awarded $20,021,000 in damages to the date of the verdict and $6,200,000 as projected future damages. The jury also awarded $112,500 against these parties for improperly charging OKC general and administrative expenses and $2,179,000 against Box as punitive damages. A final judgment was entered on the verdict on October 6, 1994.

The jury recorded the verdict on a special verdict form. Relevant portions are set forth in the selected pages of the Court's Charge to the Jury, attached hereto as Appendix C. The jury made its award of damages under the claims based on theories of breach of fiduciary duty and breach of the covenant of good faith and fair dealing.

On May 2, 1996, the Fifth Circuit Court of Appeals reversed the judgment, holding that the jury had rendered an inconsistent and irreconcilable verdict because a breach of fiduciary duty and of the covenant of good faith and fair dealing could not have occurred absent a finding of a breach of the limited partnership agreement. This decision denied the petitioners their jury verdict in violation of the Seventh Amendment to the United States Constitution because the jury's verdict was not inconsistent and any perceived inconsistency could be easily reconciled.

OKC was created on May 11, 1981, under the laws of Texas and pursuant to a partnership agreement. Cloyce K. Box and CKB & Associates were the general partners of the partnership. The primary asset of OKC was a 25%

working interest in a federal lease to conduct oil and gas exploration, development, and production on South Pass Block 89 in the Gulf of Mexico. All oil and natural gas produced in South Pass Block 89 had to be transported through a pipeline operated by Marathon Pipeline Company ("Marathon") which charged a tariff of $2.75 per barrel for transportation. In 1984, OKC made a written offer to Marathon to purchase an interest in the pipeline for $4,757,000, and on September 7, 1984, Marathon accepted OKC's offer. During the course of negotiations, Box found out that the actual cost for transporting product through the pipeline was $0.04 per barrel. The difference between $0.04 per barrel and the $2.75 per barrel charged the limited partnership produced the millions of dollars which were wrongfully diverted by Box. OKC executed an Asset Purchase Agreement with Marathon on December 3, 1984, which was then executed by Marathon on January 2, 1985. The pipeline transaction closed on March 1, 1985, with Marathon executing the Assignment and Assumption Agreement and the Conveyance Agreement with OKC on March 1, 1985. Instead of OKC tendering payment for the pipeline, Cloyce K. Box tendered payment through CKB Petroleum. Box Brothers Holding Company owned 94.4% of CKB Petroleum. Cloyce K. Box owned all of the voting stock of Box Brothers Holding Company, and 51% of all classes of interests in Box Brothers Holding Company. The other shareholders of Box Brothers Holding Company were Cloyce K. Box's sons, Don Box, Tom Box, Doug Box, and Gary Box.

On March 1, 1985, Cloyce K. Box assigned OKC's rights under the Asset Purchase Agreement to CKB Petroleum. To undertake this transaction, Cloyce K. Box executed the assignment from OKC to CKB Petroleum both in his capacity as general partner of OKC, and as an officer of CKB Petroleum. On March 1, 1985, Cloyce K. Box caused OKC to enter into a transportation agreement with CKB Petroleum whereby OKC agreed to pay a tariff of $2.75 per barrel to CKB Petroleum for 20 years. From 1985 through 1989, CKB Petroleum charged OKC $18,210,000 in transportation tariffs while CKB Petroleum was paying Cloyce K. Box an annual salary of approximately $1,000,000 per year.

In 1987, the Plaintiffs brought a derivative suit on behalf of OKC seeking to recover damages for the usurpation of the partnership opportunity to acquire an interest in the pipeline, as well as other derivative and individual claims. Just months before the trial, OKC was converted to a Delaware corporation named Box Energy Corporation.

After a two-month trial, the jury in the United States District Court for the Northern District of Texas rendered a verdict against Cloyce K. Box and CKB & Associates for breach of fiduciary duties and awarded damages of $20,021,000 for past tariffs paid by OKC to CKB Petroleum, and awarded future damages for prospective tariff charges in the amount of $6,200,000.

The Fifth Circuit Court of Appeals reversed the judgment entered in the District Court on the grounds that it

could not reconcile the jury's verdict for breach of fiduciary duty with the jury's decision not to impose liability or damages for breach of the partnership agreement.

The Charge to the Jury regarding the Plaintiffs' breach of contract claim and breach of fiduciary duty claim, in relevant part, are attached hereto as Appendix C. The jury was instructed to consider whether the general partners had breached paragraph 3.03(a) which authorized the partnership to enter into contracts with affiliates so long as the transactions are fair and reasonable to the partnership and the terms "are no less favorable to the partnership than those which could be obtained from unrelated parties." The jury was also instructed to consider whether the general partners had breached paragraph 3.05 of the partnership agreement which simply provides that the general partner shall not be liable to the partnership "unless such act or omission constitutes negligence, willful or wanton misconduct or breach of such partnership fiduciary duties to the limited partners." The partnership agreement entitled "Amended and Restated Certificate and Articles of Limited Partnership of OKC Limited Partnership" is a 41-page document with numerous provisions in addition to those specified in the instruction to the jury. The District Court provided the jury with the partnership agreement for its consideration during deliberations.

## COURSE OF PROCEEDINGS

On February 22, 1988, the District Court granted the Defendants' motion for a preliminary injunction to stop the Plaintiffs' enforcement of a consent solicitation for

removal of the general partners. The District Court's decision was affirmed on appeal in *Griffin et al. v. Box*, 910 F.2d 255 (5th Cir. 1990) ("Box I") .

On October 4, 1991, the District Court granted Plaintiffs' motion for preliminary injunction enjoining the conversion of OKC to Box Energy Corporation. The Fifth Circuit Court of Appeals reversed the District Court in *Griffin et al. v. Box*, 956 F.2d 89 (5th Cir. 1992) ("Box II").

On March 9, 1994, the District Court entered judgment on the jury verdict awarding past damages of $20,021,000 and future damages of $6,200,000 based upon the general partners' breach of the implied covenant of good faith and fair dealing and breach of fiduciary duty relating to the pipeline transaction. Upon the same claims, the jury awarded $112,500 for charging excessive general and administrative expenses to OKC. The jury awarded punitive damages against Cloyce K. Box as a result of his breach of fiduciary duty in the amount of $2,179,000.

On October 6, 1994, the District Court entered an Amended Final Judgment which did not alter the previous judgment in respects material to this Petition for Writ of Certiorari.

On May 2, 1996, the Fifth Circuit Court of Appeals rendered its decision reversing the jury's finding of liability for breach of fiduciary duty and the damages as described above and ordered a new trial of those issues on the grounds that the jury verdict contains inconsistencies that cannot be reconciled.

## ARGUMENT FOR ALLOWANCE OF WRIT

The Fifth Circuit Court of Appeals denied Plaintiffs their right to a trial by jury in violation of the Seventh Amendment of the United States Constitution. Instead of performing its duty to reconcile the jury verdict, the Fifth Circuit Panel found inconsistent answers by the jury to the special interrogatories and failed to reconcile those answers in a manner consistent with the jury's final award.

Because the Fifth Circuit Panel entered a decision in violation of the Seventh Amendment to the United States Constitution and in conflict with the prior decisions of this Court and, indeed, in conflict with decisions from the Courts of Appeal of every other Federal Circuit, including the Fifth Circuit, this case falls squarely within the criteria of Supreme Court Rule 10.1(a) and Sup. Ct. R. 10.1(c).

### I. THE FIFTH CIRCUIT PANEL ERRED WHEN IT FAILED TO RECONCILE ALLEGEDLY INCONSISTENT ANSWERS ON THE SPECIAL VERDICT FORM.

This Court has clearly and concisely delineated the duty of federal courts when faced with allegedly inconsistent answers by a jury on special interrogatories submitted pursuant to Federal Rule of Civil Procedure 49(a).

In *Atlantic & Gulf Stevedores v. Ellerbe Lines, Ltd.*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962), this Court stated:

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way, for a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment.

*Id.*, 369 U.S. at 364, 7 L. Ed. 2d at 807. In 1963, this Court addressed this identical issue, supplementing its prior decision with the following language:

> It is said that interrogatories Nos. 20 and 22 are findings of no foreseeability, and that there is therefore a fatal inconsistency among the jury's findings and that they cancel one another out, necessitating a judgment for the defendant, or at least a new trial. . . . But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them . . . . We therefore must attempt to reconcile the jury's findings, by exegesis if necessary . . . before we are free to disregard the jury's special verdict and remand the case for a new trial.

*Gallick v. Baltimore & O.R.R.*, 372 U.S. 108, 119, 83 S. Ct. 659, 9 L. Ed. 2d 618, 627 (1963) (citations omitted).

There is no dispute among the Circuit Courts of Appeal that courts at every level of the federal judicial system are required to resolve the jury's allegedly inconsistent answers to special interrogatories.[2] While the Circuit Courts have necessarily supplemented the language

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[2] *See, e.g., Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995); *Le Blanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995); *Bolden v. Septa*, 21 F.3d 29 (3d Cir. 1994); *Bristol Steel & Ironworks v. Bethlehem Steel Corp.*, 41 F.3d 182 (4th Cir. 1994); *White v. Grinfas*, 809 F.2d 1157 (5th Cir. 1987); *Jewell v. Holzer*

of *Atlantic & Gulf* and *Gallick*, none have strayed so far away from the bedrock principles established in those two cases as the Fifth Circuit Panel did in this case.

The Fifth Circuit Panel reviewed the jury verdict in a manner that is contrary to its obligation of trying to reconcile the jury's answers. The Panel ignored that the breach of partnership agreement claim and the breach of fiduciary duty claim were separate, independent causes of action. The Panel ignored the simple distinction that one claim is a tort while the other is a contract. The Panel treated the breach of partnership agreement claim as a prerequisite to the jury finding a breach of fiduciary duty under tort principles. Inconsistencies between a jury's answers to separate causes of action do not render the jury verdict fatally defective. So long as the jury verdict on the claim for breach of fiduciary duty is consistent as to all jury responses on that claim, the verdict must be upheld. This verdict is logical and reconcilable.

In response to Question 2 on the verdict form, the jury found that both general partners had breached their fiduciary duties to the partnership with regard to the pipeline transaction and awarded damages based upon evidence of the tariff collected by Cloyce K. Box from the

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*Hosp. Foundation, Inc.*, 899 F.2d 1507 (6th Cir. 1990); *American Cas. Co. v. B. Cianciolo, Inc.*, 987 F.2d 1302 (7th Cir. 1993); *Transport Ins. Co. v. Chrysler Corp.*, 71 F.3d 720 (8th Cir. 1995); *Floyd v. Laws*, 929 F.2d 1390 (9th Cir. 1991); *Palmer v. City of Monticello*, 31 F.3d 1499 (10th Cir. 1994); *Popham v. City of Kennesaw*, 820 F.2d 1570 (11th Cir. 1987); *Richardson v. Suzuki Motor Co., Ltd.*, 868 F.2d 1226 (Fed. Cir. 1989).

partnership. The jury reached the same determinations with regard to the implied covenant of good faith and fair dealing in response to Question 3 of the verdict form. The jury's logical and unequivocal decision should not be undermined by the erroneous requirement of a prerequisite finding of a breach of the partnership agreement.

The alleged inconsistency is based upon specific provisions of the partnership agreement cited in the Court's Charge to the Jury. The charge to the jury, in addition to other instructions, asked the jury to consider whether the general partners had breached paragraph 3.05 of the partnership agreement. A reading of that paragraph reveals that it is not a section of the agreement that can actually be breached. This section of the agreement simply defines when a general partner may or may not be subject to liability. The provision states that a general partner is not subject to liability unless his conduct is negligence, willful or wanton misconduct, *"or breach of such general partner's fiduciary obligations to the limited partners"* (emphasis added). The provision does not define breach of fiduciary obligations such that the jury could determine under that provision whether a breach had occurred or not.

Provision 3.03(a) affirmatively states that an affiliate of the partnership can enter into contracts with the partnership, so long as any such transactions are fair and reasonable to the partnership and the terms, "are no less favorable to the partnership than those which could be obtained from unrelated persons." The jury could easily have found no breach of this provision since the transportation agreement between OKC and CKB Petroleum required OKC to pay the same tariff of $2.75 per barrel paid by OKC to Marathon prior to conveyance of the

pipeline interest to CKB Petroleum. On this basis, the jury could have logically found that entering into the transportation agreement did not breach the partnership agreement.

The pipeline interest was ultimately conveyed by Marathon to CKB Petroleum and CKB Petroleum paid the purchase price for the pipeline. Therefore, the jury could have found that section 3.03(a) did not even apply to that transaction, because OKC was not a party to the conveyance. No provision of the partnership agreement addresses the circumstances presented in this case where the general partners stole OKC's opportunity to buy an interest in the pipeline. The jury logically and correctly determined that the usurpation of the opportunity to own part of the pipeline fits squarely within the tort of breach of fiduciary duty and made its award of damages in accord with the instructions given in the appropriate section of the verdict form. Also absent from the Fifth Circuit Panel's opinion is any recognition of the fact that the Plaintiffs had the burden of proving a breach of the partnership agreement, while the general partners, as fiduciaries, bore the responsibility to defend their conduct on the fiduciary duty claim. This distinction, standing alone, refutes the alleged inconsistency and is a sufficient basis for upholding the jury verdict.

An additional explanation for the jury's determination is any layman's understandable preference for the straight-forward instructions on fiduciary duty. The term "fiduciary obligations" is not defined in the partnership agreement.

In the case at hand, had the District Court instructed the jury solely on Plaintiffs' breach of fiduciary duty claim, and had the jury returned the answers that it did, the verdict would not be subject to challenge. Within the breach of fiduciary duty theory, the jury's verdict is logical and consistent. Comparison of the jury's answers on that count to the count for breach of partnership agreement in order to find an irreconcilable inconsistency in the verdict form is contrary to the rulings of this Court and a violation of the Plaintiffs' rights preserved by the Seventh Amendment.

The Fifth Circuit Panel did not consider the verdict in light of the instructions given; instead, the Panel tried to determine why the jury did not return a verdict in favor of the Plaintiffs on the breach of partnership agreement claim. This type of review is flawed and contrary to the clear determination of liability and damages by the jury.

The Seventh Amendment is an absolute protection to a party's right to have facts determined by a jury, and bars all courts from reexamining a fact found by a jury except in the very rare case where a jury renders a verdict with inconsistencies so material that the verdict cannot be reconciled. The Fifth Circuit Panel, in violation of the Seventh Amendment, and contrary to the decisions of this Court, has expanded the exception to swallow the rule.

This issue and the case at hand are of great legal and constitutional significance because of the importance of the right to have facts found by a jury determine the outcome of all cases, and the need for ongoing vigilance

and protection of the right to trial by jury from over-zealous appellate review.

## CONCLUSION

This Court should grant this Petition and issue a Writ of Certiorari for the reasons set forth herein.

Respectfully submitted this 30th day of July, 1996.

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 94-10348

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B.R. GRIFFIN, ET AL.,

Plaintiffs,

B.R. GRIFFIN ET AL.,

Plaintiffs-Appellants,

versus

THOMAS D. BOX and DON D. BOX,
Independent Co-Executors of the
Estate of Cloyce K. Box, ET AL.,

Defendants-Appellees.

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No. 94-10943

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B. R. GRIFFIN, ET AL.,

Plaintiffs,

B. R. GRIFFIN, ET AL.,

Plaintiffs-Appellees,

versus

THOMAS D. BOX and DON D. BOX,
Independent Co-Executors of the
Estate of Cloyce K. Box, ET AL.,

Defendants-Appellants.

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Appeals from the United States District Court
for the Northern District of Texas
(3:87-CV-2655-T)

(Filed May 2, 1996)

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Before WISDOM, GARWOOD, and JONES Circuit Judges.

EDITH H. JONES, Circuit Judge:*

In this lengthy, bitter fight for corporate control, a group of dissatisfied investors eventually succeeded in trying claims for breach of the partnership agreement, breach of an implied covenant of good faith and fair dealing, and breach of fiduciary duty against general partner Cloyce Box (now deceased) and several of his related entities. The jury found defendants liable for breach of fiduciary duty, breach of an implied covenant of good faith and fair dealing, and punitive damages based on the partnership's assignment of its potentially lucrative oil pipeline contract to one of the Box-related entities, CKB Petroleum. Not only were the past damages high – over $20 million actual plus $2 million punitive damages – but the court also imposed a "constructive trust" on future operations of the pipeline. Both sides have appealed. We are compelled to reverse and remand for a new trial because of the jury's inconsistent answers to the liability issues. We also disapprove of the imaginative, but unauthorized award of a constructive trust and dispose of several issues that will necessarily arise on remand.

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

## I. FACTS AND PROCEEDINGS BELOW

OKC Limited Partnership (OKC-LP) was created on May 11, 1981 under the laws of Texas in connection with the liquidation and dissolution of OKC Corporation (OKC Corp.). Under the plan of liquidation, Cloyce Box and a corporation controlled by him, CKB & Associates, became the general partners of OKC-LP, and the stockholders of record of OKC Corp. as of May 1, 1981 became the limited partners. In exchange for their shares of OKC Corp. common stock, the stockholders of OKC Corp. received depository receipts from Mercantile National Bank of Dallas evidencing ownership of units of interest in OKC-LP. The depository receipts were then traded in the over-the-counter stock market beginning in June 1981.

On September 18, 1981 the general partners filed a proxy statement with the Securities and Exchange Commission regarding a partnership meeting to be held on October 19, 1981 in Dallas. The purpose of the meeting was to obtain depository receipt holder approval of Cloyce Box and CKB & Associates as general partners. The proxy materials provided that depository receipt holders of record as of August 31, 1981 would be entitled to one vote for each unit of interest represented by a depository receipt. At the meeting, the receipt holders approved the selection of Cloyce Box and CKB & Associates as general partners.

Attached to the proxy materials was a copy of the OKC-LP Partnership Agreement (partnership agreement). The partnership agreement provided that "all authority

to act on behalf of the Partnership is vested in the General Partners," and that with limited exceptions, the general partners "have complete and exclusive discretion in the management and control of the business of the Partnership," including the right to "complain and defend in the name of the Partnership." *OKC Limited Partnership Agreement* §§ 3.02, 4.03 (*Partnership Agreement*). The agreement additionally provided that limited partners had certain voting, dissolution, inspection, and removal rights, and that limited partners may transfer all or part of their partnership units, but that

> such Transfer shall not confer upon the transferee any right to become a substituted limited partner.

*Id.* at §§ 4.01, 4.02, 9.02. According to the partnership agreement, a transferee may become a substituted limited partner

> only if the transferee has received the permission of the General Partners, which permission may be withheld in the sole discretion of the General Partners.

*Id.* The plaintiffs in this lawsuit – B.R. Griffin, David H. Hawk, James A. Lyle, Hayden McIlroy and J.R. Simplot – are either transferees of partnership units or original limited partners.[1]

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[1] From the Pretrial Order and other evidence in the record, the ownership interests of the plaintiffs in OKC-LP are as follows: James Lyle was an original limited partner in OKC-LP and received 27,500 units of interest in connection with the liquidation of OKC Corp. As of August 1, 1992, Lyle held 2,607 shares of Class B stock in Box Energy Corporation (Box Energy).

At the time OKC Corp. was liquidated, OKC-LP received an undivided 25 percent interest in an oil and gas lease covering South Pass Block 89 off the coast of Louisiana. In 1981, Marathon Oil Company (Marathon), which also owned a 25 percent interest in South Pass Block 89, and others, built and operated a pipeline to a receiving station in Louisiana. From 1982 until March 1, 1985. OKC-LP paid Marathon a tariff of $2.75 per barrel for use of the pipeline.[2]

In order to secure capacity in the line, on August 30, 1984. OKC-LP made a written offer to Marathon to purchase an interest in the pipeline for $4,757,000.00. A week later, Marathon accepted OKC-LP's offer to purchase the

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(As will be discussed in greater detail, Box Energy is a corporation into which OKC-LP's assets were transferred in April 1992.). David Hawk first purchased partnership units in December 1986. As of August 1, 1992, Hawk held 60 shares of Class B stock in Box Energy. J.R. Simplot first purchased partnership units in June 1985. As of August 1, 1992, Simplot held 2,575,100 shares of Class B stock in Box Energy. B.R. Griffin, according to the Pretrial Order, first purchased partnership units in July 1985. However, at trial Griffin testified that he held 22,000 shares in OKC Corp. and that he received 110,000 units in OKC-LP at the time of its creation. As of August 1, 1992, Griffin held 100 shares of Class B stock in Box Energy. According to the Pretrial Order, Hayden McIlroy first purchased partnership units in August 1985. However, at trial McIlroy testified that he was a stockholder in OKC Corp., and that he received about 25,000 units in the partnership at the time of its creation. As of August 1, 1992, McIlroy held 5,100 shares of Class B stock in Box Energy.

[2] $2.75 per barrel was the rate publicly filed with the Federal Energy Regulatory Commission.

interest. After OKC-LP advised Marathon that the interest would be purchased not by OKC-LP, but by CKB Petroleum, an OKC-LP affiliate controlled by Cloyce Box, Marathon imposed as an express condition to continuing with sale negotiations that OKC-LP be the purchaser. When the pipeline transaction closed on February 28, 1995, CKB Petroleum tendered the purchase price of $4,757,000.00.

The next day, OKC-LP assigned its rights under the purchase agreement to CKB Petroleum. OKC-LP and CKB Petroleum then executed a transportation agreement in which CKB Petroleum agreed to make available to OKC-LP all of its capacity in the pipeline for a 20-year period, and OKC-LP agreed to ship all of its oil produced in South Pass Block 89 through the pipeline. The parties also agreed to a fixed tariff rate of $2.75 per barrel for all oil transported throughout the 20-year term of the agreement.

By newsletter dated March 1, 1985, OKC-LP reported the pipeline transaction to the partnership. The letter informed investors about the negotiations with Marathon and the partnership's acquisition of an interest in the pipeline in the name of CKB Petroleum. The letter further informed them that CKB Petroleum obtained its ownership through an assignment from the partnership.

The last transaction pertinent to this lawsuit occurred seven years later, when, effective April 15, 1992, OKC-LP was dissolved and its assets and liabilities were transferred to Box Energy Corporation (Box Energy), a newly formed Delaware corporation controlled by Cloyce Box. As a result of the conversion, limited partners of OKC-LP

who had voting rights received "Class A" voting stock in Box Energy, and transferees holding depository receipts who lacked voting rights received "Class B" non-voting stock in Box Energy.

In 1990, the first, of what has become three, lawsuits between the general partners and the plaintiffs reached this court. *Box I* began in 1988 as a result of efforts by plaintiffs to replace the general partners with a corporation they controlled. *Griffin v. Box*, 910 F.2d 255 (5th Cir. 1990) (*Box I*). In response the general partners sought a preliminary injunction restraining plaintiffs from interfering with the management of OKC-LP. Plaintiffs counterclaimed for an injunction to elect new general partners following a voting contest, or, in the alternative, a determination of who was eligible to vote as a limited partner. *Box I*, 910 F.2d at 257-58.

In *Box I*, this court upheld the district court's injunction preventing plaintiffs from interfering in the partnership's day-to-day operations and from unilaterally attempting to amend the partnership agreement. *Id.* at 263. In so holding, the court found that while all the parties agreed that former OKC Corp. shareholders were limited partners of OKC-LP, the partnership agreement and depository agreement clearly did not allow transferees to become substituted limited partners unless admitted by the general partners. *Id.* at 259-60. The court, however, did not foreclose the possibility that certain transferees might have become substituted limited partners by waiver, estoppel or the permission of the general partners. *Id.* at 263.

*Box II* resulted from the efforts of the general partners to return OKC-LP to corporate form by transferring the assets of OKC-LP to Box Energy. *Griffin v. Box*, 956 F.2d 89 (5th Cir. 1992) (*Box II*). Following the approval of the plan by the limited partners, the plaintiffs moved for a temporary restraining order and a preliminary injunction preventing the transfer of assets. *Id.* at 91.

The district court awarded the requested relief. This court, however, vacated the district court's preliminary injunction and rejected the argument, accepted by the district court, that transferees could gain voting rights by waiver without general partner approval. Additionally, the court found that while an estoppel theory was "legally coherent," it was "factually unsupported by the record." *Id.* at 93.

This lawsuit was commenced in November 1987 when plaintiffs brought suit against Cloyce Box, CKB & Associates, OKC-LP, CKB Petroleum, and Box Brothers Holding Company.[3] Plaintiffs asserted eleven causes of action, namely: (1) securities fraud under section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5; (2) common law fraud; (3) negligent misrepresentation; (4) breach of fiduciary duty; (5) breach of the partnership agreement; (6) breach of the duty to render information; (7) a declaratory judgment that plaintiffs possess voting rights as limited partners of OKC-LP; (8) tort breach of

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[3] Box Brothers Holding Company (Box Brothers) has record and beneficial ownership of 94% of CKB & Associates. Box Brothers owns 94.4% of CKB petroleum. Cloyce Box owned all the voting stock of Box Brothers and 51% of all classes of securities of Box Brothers.

duty of good faith and fair dealing; (9) contract breach of covenant of good faith and fair dealing; (10) federal racketeering; and (11) derivative claims for breach of fiduciary duty, breach of contract, breach of duty to render information, tort of breach of good faith and fair dealing, contract breach of duty of good faith and fair dealing, and federal racketeering.

Claims 1 through 10 were individual claims asserted against all defendants generally relating to five subjects: the voting rights of transferee unitholders; the Marathon pipeline transaction; the level of the partnership's general and administrative expenses;[4] a 1986 loan between the partnership and real estate developer Trammell Crow; and the partnership's unrelated litigation with an oil and gas company.[5] The derivative claim was brought on behalf of the partnership against the other four defendants and was based on many of the same allegations and legal theories asserted by plaintiffs in support of their individual claims.

The two-month jury trial began in early September 1992. After plaintiffs had presented their evidence, defendants moved for judgment as a matter of law on all

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[4] On appeal, the focus of both parties is on the pipeline transaction and there is little discussion concerning the issue of general and administrative expenses. This issue, however, concerns expenses allocated by the general partners to OKC-LP, which expenses, the plaintiffs claim, should have been allocated to CKB & Associates or other Box affiliates.

[5] All claims relating to this litigation were abandoned at trial.

claims. The court granted the motion in part by dismissing with prejudice all the individual claims presented by plaintiffs and the derivative claims relating to the duty to render information and the tort duty of good faith and fair dealing. The court did not dismiss the remaining aspects of the derivative claim.

The court submitted to the jury special interrogatories pursuant to Rule 49(a) of the Federal Rules of Civil Procedure. In Question 1, the jury was asked if Cloyce Box or CKB & Associates had breached the express provisions of the partnership agreement with respect to (a) the pipeline transaction, (b) general and administrative expenses, and (c) the Trammell Crow loan transaction. In regard to the pipeline transaction and the general and administrative expenses, the jury answered "no."[6]

In Question 2, the jury was asked if Cloyce Box or CKB & Associates had breached an implied covenant of good faith and fair dealing arising from the partnership agreement with OKC-LP with respect to the same three issues in Question 1. In regard to the pipeline transaction, the jury answered "yes," and found joint liability for past damages of $20,021,000.00, and future damages of $6,200,000.00. As to the general and administrative expenses, the jury answered "yes," and found joint liability for $112,500.00.

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[6] On each of the issues, the jury found that the Trammell Crow loan created liability but caused no damages to the partnership, that result is not appealed, and that transaction will not be discussed further.

In Question 3, the jury was asked if Cloyce Box or CKB & Associates had breached any fiduciary duties owed to the partnership with respect to the same three issues in Questions 1 and 2. The jury answered Question 3 identically to Question 2.

In Question 4, the jury was asked if, as a result of an award of damages in Question 3, OKC-LP was entitled to recover punitive damages from Cloyce Box or CKB & Associates. The jury found the partnership was entitled to recover $2,179,000.00 from Cloyce Box as a result of his breach of fiduciary duties. Additionally, the jury was asked whether the two-year statute of limitations applicable to the breach of fiduciary duty claim barred the claim. The jury concluded that the claim was not barred by the statute of limitations.[7]

After considering post-trial motions, on October 5, 1994, the district court issued an Amended Final Judgment awarding damages against the Box Estate and CKB & Associates, jointly, for $20,021,000.00 for past damages, plus pre-judgment interest from March 1, 1985, until the date of the judgment; and $142,500.00 for past damages, plus pre-judgment interest at the rate of 10% from September 1, 1992, until the date of judgment; and post-judgment interest on the sums until paid. The Amended Final Judgment included the punitive damages award and the imposition of a constructive trust on the operation of the pipeline, which the court had found "a more appropriate remedy" than the award of future damages. Finally, the judgment awarded costs and attorneys' fees

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[7] The jury also rejected the federal racketeering claims.

to plaintiffs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure. Both parties have appealed, raising numerous issues as to the proceedings below.

## II. ISSUES RAISED BY DEFENDANTS

### A. Standing

Defendants' threshold argument is that Texas law did not afford a derivative claim to the unit holders; but if its did, defendants assert, these plaintiffs lack standing to pursue derivative claims on behalf of the partnership. In denying defendants' motion to dismiss the derivative claims, the district court stated that although Texas law was "unclear [as to] whether Plaintiffs have standing to maintain the derivative claims," the court "is of the opinion that the interests of justice are better served by allowing Plaintiffs to continue this action." *District Court Order*, July 6, 1990. Instead of "the interests of justice," this court considers whether the partnership agreement or Texas law supported plaintiffs' maintenance of a derivative suit.

The partnership agreement provides that the rights and obligations of partnership unit holders "shall be construed by the laws of the State of Texas including the Texas Uniform Limited Partnership Act [TULPA]." *OKC Limited Partnership Agreement* § 11.04.[8] Texas law and

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[8] TULPA, TEX. REV. CIV. STAT. art. 6132(a) (West 1970) (repealed 1992), was superseded by the Texas Revised Limited Partnership Act (TRULPA) effective September 1, 1987. TEX. REV. CIV. STAT. art. 6132a-1 (West 1995). TRULPA, however, does not apply to OKC-LP. TRULPA applies to partnerships

TULPA, however, provide little guidance regarding limited partner derivative suits. TULPA does not recognize a derivative right of limited partners to sue on a partnership cause of action, and, prior to the passage of the Texas Revised Uniform Limited Partnership Act (TRULPA) which specifically authorizes a derivative right of action for limited partners,[9] no Texas court had considered whether partners might sue derivatively on behalf of the partnership.[10] This court is constrained to make an *Erie* guess on a fairly barren landscape of authority. Fortunately, because of the change in law, the consequences of error are small. What authority there is suggests that the limited partners of OKC-LP were entitled to assert derivative claims on the partnership's behalf.

TULPA is modeled after the Uniform Limited Partnership Act (ULPA) applicable in a number of jurisdictions. The majority of courts that have considered this question under ULPA allowed derivative suits by limited partners when general partners either would not sue or were unlikely to sue because of a conflict of interest. *See Alright Missouri, Inc. v. Billeter*, 829 F.2d 631, 637 (8th Cir. 1987); *Klebanow v. New York Produce Exchange*, 344 F.2d 294, 298-99 (2d Cir. 1965); *Engl v. Berg*, 511 F. Supp. 1146, 1152-54 (E.D. Pa. 1981); *Jaffee v. Harris*, 312 N.W.2d 381,

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formed after the effective date and all partnerships doing business in Texas after August 31, 1992. *Id.* § 13.02. OKC-LP was formed in 1981 and completed its conversion to Box Energy in April 1992.

[9] TEX. REV. CIV. STAT. art. 6132a-1 § 10.01.

[10] See the Source and Comment Notes of the Bar Committee pertaining to article 10 of TRULPA. TEX. REV. CIV. STAT. art. 6132(a)-1.

383 (Mich. Ct. App. 1981); *see generally* 4 Alan R. Bromberg & Larry E. Ribstein, Bromberg & Ribstein on Partnership § 15.05(c) (1994); Debra E. Wax, Annotation, *Right of Limited Partner to Maintain Derivative Action on Behalf of Partnership,* 26 A.L.R.4th 264 (1983). *But see Yale II Mining Assoc. v. Gilliam,* 586 F. Supp. 893, 895 (W.D. Va. 1984).

Additionally, in *Cates v. International Tel. & Tel. Corp.,* 756 F.2d 1161 (5th Cir. 1985), this court discussed the remedies available under Texas law to a minority partner of a general partnership, or an owner of a partnership interest therein, who claimed to have been wronged by the other general partners. The court found no Texas decisions on point concerning shareholder derivative suits, but stated:

> [I]n a proper case – one where the controlling partners, for improper, ulterior motives and not because of what they in good faith believe to be the best interests of the partnership, decline to sue on a valid, valuable partnership cause of action which it is advantageous to the partnership to pursue – Texas law would afford some remedy to the minority partner or partnership interest owner other than merely a damage or accounting suit against the controlling partners, at least where the latter would not be reasonably effective to protect the substantial rights of the minority.

*Cates,* 756 F.2d at 1178. The court then suggested that appropriate remedies might include a derivative suit for the appointment of a receiver, or a suit by a minority

partner or interest owner for his fraction of the partnership cause of action. *Id.* at 1178-79.[11]

Further, viewing *Cates* in hindsight, the Texas State Bar Committee comments associated with TRULPA's section permitting derivative suits by limited partners cites *Cates* and cases from other jurisdictions in support of that remedy. The comments provide:

> Texas courts have not previously considered whether partners have a right to sue derivatively, although a federal court has suggested that they would have that or a similar right. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1176-81 (5th Cir. 1985) (Texas law). And courts in other jurisdictions have recognized a non-statutory derivative right based on equity principles and trust or corporate analogies. E.g., *Klebanow v. New York produce Exchange*, 344 F.2d 294 (2d Cir. 1965) (New York law); *Riveria Congress Assoc. v. Yassky*, 18 N.Y.2d 540, 223 N.E.2d 876, 277 N.Y.S.2d 386 (1966).

TEX. REV. CIV. STAT. art 6132a 1, *Source and Comment-Bar Committee*, art. 10.

Although none of the Bar Committee comments, nor *Cates*, nor caselaw from other jurisdictions is controlling as to derivative suits by limited partners under TULPA, we are persuaded that in situations in which the managing partners are unlikely to sue because of a conflict of interest, Texas law would permit that limited partners to maintain a derivative action on behalf of the partnership.

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[11] *Cates* involved a general partnership to which the Texas Uniform Partnership Act (TUPA) applied. As with TULPA, TUPA is silent as to derivative actions.

Therefore, because of the apparent conflict of interest between the limited partners and Box, CKB Petroleum and other Box affiliates, the limited partners of OKC-LP are entitled to bring a derivative suit on behalf of the partnership.

But, defendants contend, even if the OKC-LP limited partners are permitted to bring derivative claims, none of the plaintiffs in this case have standing. The parties properly focus this issue on the ownership interest of James Lyle, for only one limited partner with standing is necessary.

Lyle was an original limited partner in OKC-LP. In May 1990, however, Lyle pledged his partnership units to Southwest Securities to facilitate a margin loan, and executed an "Irrevocable Stock or Bond Power," delivering the depository receipt evidencing his ownership interest in OKC-LP to the pledgee. Lyle continued to receive dividends from OKC-LP on the pledged units.

Defendants, citing cases relating to stockholder derivative suits, argue that limited partners must maintain their investor status "throughout the pendency of the suit." *Lewis v. Knutson*, 699 F.2d 230, 238 (5th Cir. 1983). When Lyle pledged his stock in 1990, they assert, the transfer divested him of his limited partner status and his derivative standing. This is plainly incorrect under the partnership agreement. The partnership agreement defines a "transfer" to mean "a sale, exchange, assignment, gift or any other disposition whether voluntary or involuntary, during life or upon death, testate or intestate." *OKC Limited Partnership Agreement* Art. I *Definitions.* Pledging or encumbering one's interest in publicly held

securities for a margin loan is simply a security device, unlike the absolute "transfer" contemplated by the defined terms. It would have been a simple task to expand the definition of "transfer" to include a "pledge" as a security for a loan, but the partnership agreement, did not do that. Lyle continued to be a limited partner after the pledge and as a result satisfies all standing requirements.[12]

**B. Issues Regarding the Verdict**

As noted, the jury predicated derivative liability on plaintiffs' claims of breach of fiduciary duty and breach of an implied covenant of good faith and fair dealing, but it found no breach of express contractual provisions. Defendants contend that under the circumstances before us, the fiduciary duty and express contract findings are irreconcilably inconsistent, mandating a new trial. Defendants also challenge the fiduciary duty finding for a number of reasons and continue to assert that the theory of an implied covenant of good faith is not legally sustainable here. Each of these contentions requires discussion.

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[12] Plaintiffs also contend that the court should look to TRULPA for guidance in determining the standing requirements. TRULPA requires only that the plaintiff be a limited partner at the time of bringing the action and be a limited partner at the time of the transaction that is the subject of the action TEX. REV. CIV. STAT. Art. 6132a-1 § 10.01. TRULPA does not apply to this pre-TRULPA limited partnership.

### 1. Inconsistent Verdict

The Seventh Amendment requires that courts make a concerted effort to reconcile apparent inconsistencies in a jury's response to special interrogatories. *Mercer v. Long Mfg. N.C., Inc.*, 665 F.2d 61, 66 (5th Cir. 1982). When jury answers appear to be in conflict, "the reviewing court's duty is to reconcile the conflicts if possible in order to validate the jury's verdict." *FDIC v. Munn*, 804 F.2d 860, 866 (5th Cir. 1986). The touchstone inquiry for reconciliation is whether "the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted." *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973). If the answers cannot be reconciled, the court must grant a new trial. *Munn*, 804 F.2d at 866.

In Question 1, the jury was asked whether the defendants breached the express provisions of the partnership agreement. Jurors were instructed that plaintiffs contended that the general partners had breached certain sections of the partnership agreement, including sections 3.03(a) and 3.05. Section 3.03(a) precludes transactions between the general partners and their affiliates that are not "fair and reasonable" to the partnership. Section 3.05 bars the general partners from breaching their fiduciary duties.

The jury rejected the contract breach claims with respect to the pipeline transaction and the allocation of general and administrative expenses. This response entailed a finding that the general partners had not breached sections 3.03(a) or 3.05. In response to Question 3, however, the jury found that the pipeline transaction was unfair and that the general partners did breach their fiduciary duties, both of which findings constitute

express breaches of sections 3.03(a) and 3.05 of the partnership agreement. Answering Question 1, the jury imposed punitive damages against Cloyce Box for malicious, willful breach of fiduciary duties.

After careful examination of the record, we cannot conclude that these answers "may fairly be said to represent a logical and probable decision on the relevant issues as submitted," *Matherne*, 471 F.2d at 915, nor have plaintiffs offered a satisfactory interpretation that reconciles these answers. The pipeline transaction (and allocation of partnership expenses) cannot have simultaneously been permitted by the partnership agreement while violating the general partners' fiduciary duties. Nor, on the facts before us, can the jury's rejection of a breach of contract be squared with the finding of malicious conduct underlying the punitive damages award. Consequently, defendants are entitled to a new trial on these theories.

### 2. Implied Covenant of Good Faith and Fair Dealing

The verdict finding no contract breach would also be inconsistent with the jury's finding that defendants breached an implied covenant of good faith were it not for a more fundamental problem – these theories are legally irreconcilable. We agree with defendants' contention that Texas does not recognize a claim for breach of an implied covenant of good faith and fair dealing under these circumstances.

In *Exxon Corp. v. Atlantic Richfield*, 678 S.W.2d 944 (Tex. 1984), the Texas Supreme Court stated that "[t]here can be no implied covenant as to a matter specifically

covered by the written terms of the contract. The agreement made by the parties and embodied in the contract itself cannot be varied by an implied good faith-and-fair-dealing covenant." *Id.* at 947.

In this case, the partnership agreement provides:

> No General Partner . . . shall be liable to the Partnership or to the Partners for losses sustained or liabilities incurred as a result of an act or omission which such General Partner in good faith reasonably believed to be in, or not opposed to, the best interests of the Partnership, unless such act or omission constituted negligence, willful or wanton misconduct or breach of such General Partner's fiduciary obligations to the Limited Partners.

Section 3.05. Concerning affiliate transactions, the partnership agreement in section 3.03(a) provides:

> An Affiliate may enter into contracts with the Partnership as operator, seller or purchaser of properties or services, or in other capacities, so long as the transactions are fair and reasonable to the Partnership and the terms of the contract or conveyance are no less favorable to the Partnership than those which could be obtained from Unrelated Persons.

The import of these sections is plain. General partners are not liable for conducting the partnership business in good faith except for negligence, willful or wanton misconduct or breach of fiduciary duties. Additionally, an affiliate may contract for services with the partnership on terms that are fair and reasonable and for arms-length value. An implied covenant of good faith and fair dealing could have only two possible effects on these carefully

drawn provisions: it would either be surplusage, redundant of the express contractual limits on general partner/affiliate actions; or it would *add to* those limits by condemning as "unfair" or in "bad faith" transactions not otherwise prohibited. Neither of these effects justified a separate claim for relief, stated in a separate special interrogatory to the jury. A contractually-founded obligation would be redundant of the breach of contract issues. Moreover, an amendatory implied covenant furnishes no basis for relief to plaintiffs because Texas does not permit such a variance of the contract. *Exxon Corp.*, 678 S.W.2d at 947.

Plaintiffs assert that the jury was properly instructed on the implied covenant of good faith and fair dealing pursuant to Tex. Bus. & Comm. Code § 1.203 and because the implied covenant is integral to the partnership's fiduciary relationships. Neither of these arguments is persuasive in the present context. If it applies at all to a partnership contract, the duty of good faith expressed in the Texas Business & Commerce Code must "relate to some aspect of performance" *under the parties' agreement. Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 482 (Tex. App. – Corpus Christi 1989, writ denied). This standard is not inconsistent with the *Exxon Corp.* principle that implied covenants may not vary the terms of a written agreement.

The other argument, that an implied covenant of good faith and fair dealing creates a separately actionable claim *because of* the parties' fiduciary relationship, has it backwards. As the Texas Supreme Court explained:

> Although a fiduciary duty encompasses at the very minimum a duty of good faith and fair dealing, the converse is not true. The duty of good faith and fair dealing merely requires the parties to "deal fairly" with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own. Often attributed to a fiduciary duty.

*Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591 (Tex. 1992). As general partners of a limited partnership, the defendants owed fiduciary duties to the limited partners, codified in part by § 3.05 of the OKC-LP agreement. But unlike many fiduciary arrangements, the agreement specifically permitted affiliate transactions by the general partners. No less in contractually-regulated fiduciary relationships than in other contractual arrangements should the terms selected by the parties by [sic] usurped by *post hoc* judicial implication of different terms. We decline to accept plaintiffs' invitation to condemn by means of an implied covenant an action arguably condoned by the express terms of the partnership agreement. The claim based on an implied covenant of good faith and fair dealing was erroneously submitted to the jury.

### 3. Fiduciary Duty

Defendants contend that the district court erred in submitting the claim for breach of fiduciary duty to the jury because the claim, as it relates to the pipeline transaction, is barred by the statute of limitations. Alternatively, they assert, there was insufficient evidence to

support the verdict, and the jury instructions were flawed. As might have been inferred from our discussion of the inconsistent verdict, we find none of those arguments compelling.

Texas law provides a two-year statute of limitations for breach of fiduciary duty. *Kansa Reinsurance Co. v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1374 (5th Cir. 1994). The limitations period "commences when the aggrieved party has either knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge thereof." *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988) (citations and internal quotations omitted). Defendants have the burden of proof as to the running of the statute of limitations. *Security Indus. Ins. Co. v. United States*, 702 F.2d 1234, 1251 (5th Cir. 1983). This court views all evidence in a light most favorable to the jury's verdict and "the verdict must be affirmed unless the evidence points so strongly and overwhelmingly in favor of one party the court believes that reasonable persons could not arrive at a contrary conclusion." *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992).

Defendants contend that the newsletter dated March 1, 1985 from OKC-LP to its investors detailing the pipeline transaction put the limited partners on notice of any purported breach of fiduciary duties, and that their suit, which was filed in November 1987, is therefore barred by the two-year statute of limitations. The partnership agreement, however, expressly permits the partnership to enter into transactions with affiliates. Additionally, the newsletter failed to disclose that the partnership would continue to pay the same tariff to

CKB-Petroleum that it had paid to Marathon. Viewed in a light most favorable to the jury verdict, the evidence supports the jury's verdict. *See Brown v. Bryan County*, 67 F.3d 1174, 1179 (5th Cir. 1995) ("[T]his Court will not impose its own opinion in contravention to the jury's.").

Defendants next contend that the district court erred in submitting the fiduciary duty claim to the jury because the pipeline transaction was not a partnership opportunity. Defendants argue that the partnership was not financially and legally capable of undertaking the transaction, which was fair and reasonable to the partnership. As to the partnership's financial and legal inability to purchase the pipeline, defendants contend that the terms of a loan agreement between OKC-LP and Manufacturers Hanover Trust Company (Loan Agreement) prevented the partnership from purchasing the pipeline. Further, the pipeline transaction was fair based on the environmental risks that were avoided and the tariff price paid to CKB Petroleum, as well as the fact that the partnership did not have to pledge its oil and gas reserves to Marathon as security for the partnership's obligations.

At trial, conflicting evidence was produced regarding defendants' claims of fairness and financial and legal inability. Plaintiffs' evidence showed that the partnership had sufficient funds to purchase the pipeline interest and that the partnership had suffered $21,357,000.00 in damages as a result of the transfer of the pipeline interest to CKB Petroleum. Plaintiffs further demonstrated that CKB Petroleum was able to obtain insurance coverage for the pipeline and that no documents could be produced establishing that Marathon requested a pledge of OKC-LP's oil reserves as security incidental to the pipeline transaction.

The Loan Agreement had previously been amended to allow for cash distributions, and no evidence established whether the partnership had ever asked Manufacturers Hanover Trust Company for a waiver of restrictions in the Loan Agreement in order to purchase the pipeline. Viewed in a light most favorable to the jury verdict, the evidence supports the jury verdict. *See Brown*, 67 F.3d at 1179.[13]

Defendants' final argument is that the district court improperly instructed the jury on their affirmative defenses against the fiduciary duty claim, i.e., the defenses of financial and legal inability, and reliance on advice of counsel. To succeed in this challenge defendants must satisfy the test reiterated in *FDIC v. Mijalis*, 25 F.3d 1314 (5th Cir. 1995):

> First, the challenges must demonstrate that the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations. Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case. If a party wishes to complain on appeal of the district court's refusal to give a proffered instruction, that party must show as a threshold

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[13] Defendants' argument that the partnership was not financially or legally able to acquire the pipeline interest is somewhat shallow considering that both the March 1, 1985 partnership newsletter and the 1985 OKC-LP Annual Report provide that CKB Petroleum acquired its interest in the pipeline "through and assignment from the Partnership."

> matter that the proposed instruction correctly stated the law.

*Id.* at 1318 (internal citations omitted).

Under Texas law, advice of counsel is a factor to be considered in determining whether a breach of fiduciary duty has occurred. *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 722-23 (5th Cir. 1984). In this case, the jury charge instructed that a "fiduciary is entitled to rely on the advice of experts, such as lawyers and accountants, in making business decisions so long as the fiduciary is acting reasonably and in good faith." This charge properly guided the jury in its deliberation.

The jury was instructed that it "may also consider whether the Limited Partnership was financially unable to acquire an interest in the pipeline." Financial inability to take advantage of a corporate or partnership opportunity is a defense under Texas law in a suit involving breach of fiduciary duties. *See Canion v. Texas Cycle Supply, Inc.*, 537 S.W.2d 510, 513 (Tex. Civ. App. Austin 1976, writ ref'd n.r.e.); *see also In re Safety Int'l Inc.*, 775 F.2d 660, 662 (5th Cir. 1985); *Huffington v. Upchurch*, 532 S.W.2d 576, 578 (Tex. 1976). The jury instruction, therefore, failed to properly guide the jury in that it merely instructed them to "consider" the finances of the partnership in the context of the pipeline transaction, rather than to treat financial inability as a defense. But based on the record read in the light most favorable to the verdict, there is sufficient evidence to support a determination that the partnership had the financial ability to acquire the pipeline. This fact, coupled with the instruction actually given, which at a minimum drew the jury's attention to the financial ability

of the partnership to acquire the pipeline, leads us to conclude that the erroneous instruction did not affect the outcome of the case.

Defendants also assert that the jury should have been instructed that legal incapacity to undertake the pipeline transaction was a defense. Without supporting Texas law citations for their position, defendants have failed to demonstrate that the instruction correctly stated the law. *Mijalis*, 15 F.3d at 1318. But, additionally, although it is probable that legal incapacity would be a defense in Texas, defendants did not show that the loan agreements with their banks, or any other agreements to which OKC-LP was a party, posed legal barriers to the pipeline transaction. The limited partnership in fact signed the original agreement to purchase the pipeline. Because of the factual insufficiency to support defendants' position, the district court did not err in refusing this instruction.

## III. ISSUES RAISED BY PLAINTIFFS

On cross-appeal, plaintiffs contend that the district court erred in granting defendants' motion for judgment as a matter of law on their individual and derivative claims for limited partner status and voting rights, and on their individual claims for securities fraud, common law fraud, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing. Plaintiffs seek entry of judgment in their favor on these claims or a

new trial. We must consider each of their claims separately.[14]

Under Rule 50(a) of the Federal Rules of Civil Procedure, a party is entitled to judgment as a matter of law if the opposing party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party on that issue, Fed. R. Civ. P. 50(a). A grant of judgment as a matter of law is subject to *de novo* review. *Lloyd v. John Deere Co.*, 922 F.2d 1192, 1194 (5th Cir. 1991).

### A. Breach of Fiduciary Duty and Implied Covenant of Good Faith and Fair Dealing

State law determines whether a cause of action against the general partners of a limited partnership is direct or derivative. *7547 Corporation v. Parker & Parsley Dev. Partners*, 38 F.3d 211, 221 (5th Cir. 1994). Plaintiffs cite no Texas cases, and we have found none, holding that an investor or limited partner in a limited partnership may sue directly for a breach of fiduciary duty which injured the partnership. Following the guidance of this court in *Parker & Parsley*, we believe that a Texas court would likely consider the fiduciary duty claim in this case to be derivative. *See Parker & Parsley*, 38 F.3d at 221 (unitholders and limited partners may not sue directly under Texas law for wrongs suffered by the partnership).

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[14] The parties raise contentions that various issues and arguments were waived because they were not preserved in the trial court. We have considered the waiver claims and discuss in text those issues and arguments which we concluded have been preserved for appellate review.

The district court, therefore, properly adjudged against plaintiffs their claim for breach of fiduciary duty. And inasmuch as there is not even a derivative claim for breach of an implied duty of good faith and fair dealing, it stands to reason that such a claim is not cognizable on behalf of individual limited partners for damage to the partnership.

### B. Limited Partner Status and the Right to Vote

The decisions of this court in *Box I* and *Box II* make clear that under the terms of the partnership agreement transferees may only become substituted limited partners as permitted by the general partners. *Box I*, 910 F.2d at 260-61; *Box II*, 956 F.2d at 91. Plaintiffs contend that the district court erred in granting defendants' motion for judgment as a matter of law on their claims for limited partner status and voting rights because the general partners either consented to the admission of all depository receipt holders as substituted limited partners with the right to vote, or the general partners are now estopped from denying plaintiffs' limited partner status with voting rights. Additionally, certain of the investor-plaintiffs contend that they are entitled to receive Class A stock in Box Energy because of their status as original limited partners in OKC-LP at the time of the partnership's conversion to the Box Energy. Each of these contentions requires discussion.

**1. Consent**

Plaintiffs argue that several documents distributed by either the partnership or the general partners granted voting rights to all transferees of partnership units and establish that the general partners consented to the admission of all depository receipt holders as substituted limited partners. In support of their argument, plaintiffs cite several documents. First, a newsletter dated August 20, 1981 from OKC-LP to depository receipt holders stated that depository receipt holders own a "partnership interest." Second, proxy materials relating to the October 1981 meeting in Dallas provided in part that "[a] transferee of a Limited Partnership interest that does not become a Substituted Limited Partner may not demand to inspect the books and records of the Limited Partnership, nor demand dissolution of the partnership but otherwise has all the rights and powers of a Limited Partner." Third, a newsletter dated September 30, 1983 from OKC-LP to partnership unitholders states that "[a] unitholder is a limited partner and, accordingly, owns a direct interest in proven oil and gas reserves." Fourth, a partnership 10-K Form dated December 31, 1985 contains language concerning the rights of transferees identical to that quoted from the 1981 proxy materials. Fifth, proxy materials sent by OKC-LP to partnership unitholders regarding a meeting to be held in December 1986 provided that depository receipt holders as of November 10, 1986 would be permitted to vote at the meeting. Sixth, in a November 24, 1986 letter written by Cloyce Box to J.R. Simplot, Box referred to Simplot as a "limited partner" and characterized all other investors as limited partners. Finally, a Schedule 13D for OKC-LP dated January 7, 1987 was filed by

Cloyce Box with a representation that his purpose in acquiring additional partnership units was to increase his voting power.

Numerous though these documents are, they fail to sustain plaintiffs' contention. Each reference is seriously flawed. In quoting from the 1981 proxy materials and the 10-K Form concerning the rights of transferees, plaintiffs omitted language directly preceding and within the same paragraph, which expressly provides the transferees may be admitted to the partnership only by the general partners. The cover page of the 1986 proxy materials states that only depository receipt holders who are limited partners as of November 10, 1986 would be permitted to vote, and the November 24, 1986 letter from Cloyce Box to Simplot simply does not establish consent to limited partner status for transferees. The Schedule 13D says nothing about Box's ability to vote the additional units he had acquired, and the language cited by plaintiffs in the two newsletters is taken from general discussions of the tax benefits of the general partnership and says nothing about voting rights.

At most, the documents and evidence at trial show that some depository receipt holders who were not original limited partners in OKC-LP were permitted to vote in October 1981. Nothing in the documents or testimony, however, establishes that the general partners consented to admit depository receipt holders as substituted limited partners with voting rights. Considering the clear disclaimer in the partnership agreement, plaintiffs have failed to establish a genuine issue of material fact as to whether the general partners granted voting rights to

transferees or consented to the admission of depository receipt holders as limited partners.

### 2. Estoppel

Plaintiffs next invoke the doctrine of equitable estoppel in support of their alleged entitlement to limited partner status and voting rights. To establish equitable estoppel, plaintiffs must prove (1) a false representation or concealment of material facts made with the intention that it should be acted on, (2) to a party without knowledge, or the means of knowledge of those facts, and (3) who reasonably and detrimentally relied upon the misrepresentation. *Box II*, 956 F.2d at 93; *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991). Concerning equitable estoppel, the Texas Supreme Court stated in *Gulbenkian v. Penn*, 252 S.W.2d 929 (Tex. 1952) that "the facts alleged to constitute [estoppel] are not to be taken by argument or inference. . . . and [i]f an act or admission is susceptible to two constructions, one of which is consistent with a right asserted by the party sought to be estopped, it forms no estoppel." *Id.* at 932 (internal quotations and citations omitted).

In granting defendants' Rule 50(a) motion as to plaintiffs' estoppel argument, the district court found that they had failed to show that they purchased partnership units in reasonable reliance on purported misrepresentations made by the general partners concerning transferee voting rights. The focus of plaintiffs' argument on appeal is that the estoppel claim should have been submitted to the jury because the evidence demonstrates triable fact issues, particularly on the element of reliance. In support

of their argument, plaintiffs point to evidence of reliance by each individual plaintiff, a brief summary of which follows.

*B.R Griffin*

Griffin testified that when OKC Corp. was converted into OKC-LP in 1981, he owned shares of stock in OKC Corp. which were exchanged for OKC-LP partnership units. He attended the 1981 meeting in Dallas, and he voted at that meeting. Griffin felt that he had voting rights in OKC-LP because of certain documents that he had received from the partnership, and this belief influenced his decision to buy additional partnership units. The documents cited by Griffin include the following: the 1981 proxy materials; the September 30, 1983 partnership newsletter: the 1986 proxy materials; and a 1985 OKC-LP Annual Report which contains language identical to that previously quoted from the 1901 proxy materials concerning the rights of transferees. Additionally, Griffin felt that he had a right to vote because he voted at the 1981 meeting in Dallas.

*Hayden McIlroy*

McIlroy testified that when OKC Corp. was converted into OKC-LP in 1981, he owned shares of stock in OKC Corp. which were exchanged for OKC-LP partnership units. McIlroy attended the 1981 meeting in Dallas.

*James Lyle*

As discussed previously, Lyle was an original limited partner in OKC-LP and attended the 1981 meeting in Dallas. As to the issue of reliance, Lyle testified that when an investment partnership in which he belonged disbanded in 1984, he elected to receive OKC-LP partnership units instead of cash because he felt that OKC-LP was a good investment and that he had the ability to vote the shares he received. In making this determination, Lyle relied upon partnership newsletters, quarterly reports and annual reports. Additionally, Lyle claimed to have relied on language in the depository receipt representing his ownership interest in the partnership, which provided, in part, that a transferee has the "right to become a Limited Partner in OKC[-LP] subject to the applicable provisions of the Partnership Agreement."

*J.R. Simplot*

Simplot first invested in OKC-LP in June 1985. He testified that he relied on the November 24, 1986 letter from Cloyce Box in making additional purchases of partnership units.

*David Hawk*

Hawk first invested in OKC-LP in December 1986. Hawk presented no evidence of reliance at trial.

After a thorough review of the record, we agree with the district court that there is no legally sufficient evidentiary basis for a reasonable jury to find that plaintiffs

reasonably and detrimentally relied upon purported misrepresentations by the general partners concerning limited partner status and voting rights in purchasing or acquiring additional partnership units. Despite plaintiffs' self-serving testimony concerning reliance, the evidence shows that each of them is a sophisticated investor with experience in the purchase and sale of securities. The most that can be said concerning the documents and events upon which plaintiffs purportedly relied is that they are ambiguous at best as to limited partner status and voting rights. Reliance on ambiguous acts or admissions is not enough to establish estoppel. *Gulbenkian*, 252 S.W.2d at 932.[15]

Simplot failed to establish reliance for a different reason. He could not have put much faith in Box's letter for purposes of estoppel because after receiving it, he transferred all of his partnership units to Hydrocarbons Management Inc., and then reacquired those units after the district court's February 22, 1988 injunction order that was affirmed in *Box I*. In other words, all of Simplot's partnership units were obtained with knowledge that his partnership units carried no voting rights. And shortly after Simplot received the letter from Box, Simplot's attorneys explained to him that there was some doubt as

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[15] Plaintiffs claimed reliance on their attendance and voting at the 1981 meeting in Dallas is questionable considering that the materials provided to depository receipt holders concerning the meeting state that "[t]here is no statutory or other legal requirement for holding this meeting, other than the desire of the general partners to obtain the ratification and support of the Depository Receipt holders."

to whether the partnership agreement permitted transferees to vote. The evidence further shows that Simplot's investment in OKC-LP was motivated by his belief that the partnership had the potential for future financial success.

Plaintiffs thus failed to establish a genuine fact issue concerning the element of reasonable reliance essential to their claim of estoppel. *Box II* , 956 F.2d at 93. We affirm the district court's grant of judgment as a matter of law.

### 3. Estoppel by Silence

Texas law recognizes estoppel by silence. *Williams v. Stansbury*, 649 S.W.2d 293, 296 (Tex. 1983). This doctrine applies "where a person, who by force of circumstances has a duty to speak, refrains from doing so thereby causing another party to believe in the existence of a state of acts, and that other party relies thereon to its prejudice." *A.B.F. Freight Systems, Inc. v. Austrian Import Service, Inc.*, 798 S.W.2d 606, 610 (Tex. App. Dallas 1990, writ denied). Plaintiffs contend that the district court erred in refusing to permit evidence of certain omissions of the general partners. We disagree. Plaintiffs are all sophisticated investors who had access to the partnership agreement. The partnership agreement contained a "clear and unequivocal" statement of the rights of transferees. *Box I*, 910 F.2d at 260. Plaintiffs had at least constructive knowledge of the limited rights of transferees, and as a result cannot establish an estoppel by silence. *See A.R. Clark Investment Co. v. Green*, 375 S.W.2d 425, 435 (Tex. 1964) (no

estoppel by silence because the purchaser had constructive knowledge of acceleration rights).

### 4. Original Limited Partners

Plaintiffs Lyle, Griffin and McIlroy also contend that they are entitled to Class A voting stock in Box Energy because of their status as original limited partners in OKC-LP. The status of Lyle as an original limited partner is not disputed, and we have found that his pledge of partnership units did not affect his status as a limited partner. Lyle, therefore, is entitled to Class A voting stock in Box Energy in accordance with his ownership of original partnership units held at the time of the partnership's conversion to Box Energy.

The status of McIlroy and Griffin as original limited partners, however, is disputed by the parties. On remand, the district court should determine the amount of Class A voting stock to which Lyle is entitled and ascertain whether Griffin and McIlroy were original limited partners and the amount, if any, of Class A stock in Box Energy to which they are entitled based upon ownership of original partnership units held at the time of the partnership's conversation to Box Energy.

## C. Securities Fraud and Common Law Fraud

An essential element of plaintiffs claim for securities fraud and common law fraud is the establishment of

reliance.[16] As with the estoppel claim, plaintiffs failed to make the necessary showing of reliance.[17] The district court's grant of judgment, as a matter of law was proper.

### D. Other Issues

For the benefit of the district court on remand, we note that the imposition of the constructive trust was

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[16] Plaintiffs fail to specify the source of law under which they seek recovery for securities fraud. However, under both section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5, reliance is required. *See Laird v. Integrated Resources, Inc.*, 897 F.2d 826, 832 n. 12 (5th Cir. 1990). Additionally, reliance is required to establish a claim for common law fraud under Texas law. *South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108, 1120 (5th Cir. 1984).

[17] Plaintiffs contend that the necessary showing of reliance is established by the "fraud on the market theory" and "Ute presumption." *Basic v. Levinson*, 485 U.S. 224, 104 S. Ct. 978 (1988) (fraud on the market theory); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S. Ct. 1456 (1972) (Ute presumption). Neither theory, however, helps plaintiffs establish reliance. This case is based generally upon purported misrepresentations by the general partners. "Ute presumption" applies only to "rule 10b-5 actions based primarily upon omissions rather than misrepresentations." *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1119 (5th Cir. 1988), *vacated on other grounds, Pryar v. Abell*, 492 U.S. 914, 109 S. Ct. 3236 (1989); *see Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 359-60 (5th Cir. 1987), *cert. denied*, 485 U.S. 959, 108 S. Ct. 1220 (1988). Additionally, any presumption of reliance afforded by the fraud on the market theory is overcome by the defendants' evidence that the OKC-LP Partnership Agreement was available to the public, and therefore, the market price of partnership units would not have been affected by any purported misrepresentations. *Basic*, 486 U.S. at 248-49, 108 S. Ct. at 992.

improper in this case. While Texas law recognizes the equitable remedy of a constructive trust, the plaintiffs sought, and the jury granted a money award for future damages. Plaintiffs received what they requested of the jury; in so doing they conceded that a monetary remedy suffices, negating the need for equity to intervene. *See Fuqua v. Taylor,* 683 S.W.2d 735, 739 (Tex. App.-Dallas 1984, writ ref'd n.r.e.) (constructive trust is equitable remedy).

Additionally, plaintiffs argue that the district court's award of attorneys' fees was proper under the common fund doctrine. They conceded at oral argument, however, that an award under the common fund doctrine requires that the fee be taken out of the common fund and not be levied in addition to the damage award received, *See Knebel v. Capital National Bank,* 518 S.W.2d 795, 799 (Tex. 1974); *Crouch v. Tenneco, Inc.,* 853 S.W.2d 643, 647 (Tex. App.-Waco 1993, writ denied); *City of Dallas v. Arnett,* 762 S.W.2d 942, 954 (Tex. App.-Dallas 1988, writ denied). The district court, therefore, erred in granting plaintiffs' attorneys' fees in addition to the damage award.

Because questions about prejudgment interest are fact-dependent, we need not speculate at this time on the availability of prejudgment interest after a new trial.

## IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's grant of judgment as a matter of law as to plaintiffs' individual and derivative claims for limited partner status and voting rights based on theories of estoppel and consent, and on their individual claims for securities

fraud, common law fraud, breach of fiduciary duty, and breach of the covenant of good faith and fair dealing. We REMAND for further proceedings to determine (1) the amount of Class A stock in Box Energy to which Lyle is entitled, and (2) whether Griffin and McIlroy were original limited partners, and the amount, if any, of Class A stock in Box Energy to which those two are entitled. Additionally, we REVERSE and REMAND for a new trial, subject to the limitations described above, the judgment in favor of plaintiffs for actual and punitive damages.

**AFFIRMED** in **PART, REVERSED** and **REMANDED** in **PART.**

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

---

B.R. GRIFFIN, DAVID H. HAWK, JAMES A. LYLE, HAYDEN McILROY, and J.R. SIMPLOT,

Plaintiffs,

No. 3:87-CV-2655-T

v.

THOMAS D. BOX and DON D. BOX, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF CLOYCE K. BOX, CKB & ASSOCIATES, INC., OKC LIMITED PARTNERSHIP, CKB PETROLEUM, INC. and BOX BROTHERS HOLDING COMPANY

Defendants.

## AMENDED FINAL JUDGMENT

(Filed Oct. 6, 1994)

This action came on before the Court on a jury trial on September 8, 1992, and on Plaintiffs' motion for summary judgment on the counterclaims, filed November 6, 1992, Honorable Robert B. Maloney, presiding, and Defendants having moved during trial for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a), and all issued [sic] having been duly considered and a decision having been rendered.

It is ORDERED and ADJUDGED that, on Plaintiffs' individual claim for securities fraud (Claim 1), judgment is entered against Plaintiffs, Plaintiffs shall take nothing on Claim 1, and Claim 1 is dismissed with prejudice;

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' individual claim for common law fraud (Claim 2), judgment is entered against Plaintiffs, Plaintiffs shall take nothing on Claim 2, and Claim 2 is dismissed with prejudice;

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' individual claim for negligent misrepresentation (Claim 3), judgment is entered against Plaintiffs, Plaintiffs shall take nothing on Claim 3, and Claim 3 is dismissed with prejudice;

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' individual claim for breach of fiduciary duty (Claim 4), judgment is entered against Plaintiffs, Plaintiffs shall take nothing on Claim 4, and Claim 4 is dismissed with prejudice;

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' individual claim for breach of contract (Claim 5), judgment is entered against Plaintiffs, Plaintiffs shall take nothing on Claim 5, and Claim 5 is dismissed with prejudice;

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' individual claim for breach of duty to render information (Claim 6), judgment is entered against Plaintiffs, Plaintiffs shall take nothing on Claim 6, and Claim 6 is dismissed with prejudice;

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' declaratory judgment claim (Claim 7), judgment is entered against Plaintiffs, Plaintiffs shall take nothing on Claim 7, and Claim 7 is dismissed with prejudice;

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' individual claim for the tort of breach of the duty of good faith and fair dealing (Claim 8), judgment is entered against Plaintiffs, Plaintiffs shall take nothing on Claim 8, and Claim 8 is dismissed with prejudice;

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' individual claim for breach of the contract duty of good faith and fair dealing (Claim 95), [sic] judgment is entered against Plaintiffs, Plaintiffs shall take nothing on Claim 9, and Claim 9 is dismissed with prejudice;

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' individual claim for violation of sections 1962(a), 1962(b), and 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (Claim 10), judgment is entered against Plaintiffs, Plaintiffs shall take nothing on Claim 10, and Claim 10 is dismissed with prejudice;

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' derivative claims on behalf of OKC Limited Partnership (Claim 11), to the extent that these claims are based on breach of the duty to render information, the tort duty of good faith and fair dealing, and the Aminoil Litigation, judgment is entered against Plaintiffs, Plaintiffs shall take nothing on these derivative claims, and these claims are dismissed with prejudice;

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' derivative claims on behalf of OKC Limited Partnership for violations of sections 1962(a), 1962(b), and 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (Claim 11, judgment is entered against Plaintiffs, Plaintiffs shall take nothing on this derivative claim.

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' derivative claim on behalf of OKC Limited Partnership for breach of the express provisions of the Partnership Agreement (Claim 11), judgment is entered against Plaintiffs, Plaintiffs shall take nothing on this derivative claim.

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' derivative claim on behalf of OKC Limited Partnership against Defendant Cloyce K. Box and against Defendant CKB & Associates, for breach of the implied covenant of good faith and fair dealing arising from the Partnership Agreement, and breach of fiduciary duties (Claim 11), judgment is entered in favor of Plaintiffs and against Defendants Thomas D. Box and Don D. Box, as Independent Co-Executors of the Estate of Cloyce K. Box and against Defendant CKB & Associates, jointly, in the amount of $20,021,000 for past damages, plus prejudgment interest thereon at the rate of 10% from March 1, 1985, until the date of the judgment; $142,500 for past damages, plus prejudgment interest at the rate of 10% from September 1, 1992, until the date of the judgment, and postjudgment interest thereafter at the rate of 4.22% per year until paid on such amounts, including prejudgment interest. Plaintiffs are awarded nothing as to future damages on these claims as they pertain to the pipeline

transaction, subject to this Court's entry of a further order imposing a constructive trust and requiring an accounting on post-trial damages pertaining to the pipeline.

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' derivative claim on behalf of OKC Limited Partnership against Defendant General Partner Cloyce K. Box for breach of fiduciary duties (Claim 11), judgment is entered in favor of Plaintiffs and against Defendants Thomas D. Box and Don D. Box, as Independent Co-Executors of the Estate of Cloyce K. Box, in the amount of $2,179,000 for punitive damages, plus post-judgment interest at the rate of 4.22% per year from the date of the Judgment until paid.

It is FURTHER ORDERED and ADJUDGED that a constructive trust is hereby imposed upon the South Pass West Delta Pipeline Interest in the name of CKB Petroleum, Inc., for the benefit of OKC Limited Partnership, upon terms to be ordered by the Court.

It is FURTHER ORDERED and ADJUDGED that, on Plaintiffs' [sic] are awarded their costs of suit pursuant to Fed. R. Civ. P. 54(d) and attorneys' fees to be determined by the Court.

It is FURTHER ORDERED and ADJUDGED that Defendants' counter-claims against Plaintiffs for violation of the Securities and Exchange Act are dismissed with prejudice.

It is FURTHER ORDERED and ADJUDGED that all relief not specifically granted herein is denied.

SIGNED this 5th day of October, 1994.

/s/ Robert B. Maloney
Robert B. Maloney
United States
District Judge

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

---

B.R. GRIFFIN, DAVID H. HAWK, JAMES A. LYLE, HAYDEN McILROY, and J.R. SIMPLOT,

Plaintiffs,

No. 3:87-CV-2655-T

v.

CLOYCE K. BOX, CKB & ASSOCIATES, INC., OKC LIMITED PARTNERSHIP, CKB PETROLEUM, INC., and BOX BROTHERS HOLDING COMPANY,

Defendants.

### COURT'S CHARGE TO THE JURY

(Filed Oct. 29, 1992)

**Section 1**

MEMBERS OF THE JURY:

Now that you have heard the evidence, it is my duty to instruct you as to the law applicable to this case. It is your duty as jurors to follow the law as stated in the instructions of the Court and to apply the rules of law so given to the facts as you find them from the evidence in the case.

The following instructions contain the law that you should apply in answering certain questions of fact in the case, and I will also read those questions to you.

* * *

**Section 3**

**Breach of the Partnership Agreement**

The Limited Partnership Agreement is a contract between Cloyce K. Box, CKB & Associates, Inc., and the OKC Limited Partnership.

Plaintiffs contend that Cloyce K. Box and CKB & Associates, Inc., the General Partners of the Limited Partnership, have committed the following breaches of express provisions of the Limited Partnership Agreement:

1. Violation of Section 2.03, precluding use of partnership assets for a purpose other than that defined by the Partnership Agreement;
2. Violation of Section 3.02(a), (f), (k),(n),(s), and (t), by the General Partners not exercising the authority granted to them for the benefit of the Partnership;
3. Violation of Section 3.03(a), precluding transactions between the General Partners and affiliates of the General Partners that are unfair to the Partnership;
4. Violation of Section 3.03(g), prohibiting loans by the Partnership to an affiliate; and
5. Violation of Section 3.05 prohibiting General Partners from breaching their fiduciary obligations and engaging in willful or wanton misconduct.

Plaintiffs have the burden to prove, by a preponderance of the evidence, that the General Partners breached the express provisions the Partnership Agreement.

If Plaintiffs have satisfied this burden, you should find for Plaintiffs on this issue. Otherwise, you should find for Defendants on this issue.

* * *

**Section 5**

**Breach of Fiduciary Duty**

Plaintiffs contend that Defendant General Partners Cloyce K. Box and CKB and Associates breached their fiduciary duties with respect to (i) the pipeline transaction; (ii) general and administrative expenses incurred by or allocated to OKC; and (iii) the Trammell Crow loan.

A fiduciary duty arises only from a fiduciary relationship, that is, a relationship of justifiable trust and confidence between the parties. A general partner of a partnership owes a fiduciary duty to the partnership. That fiduciary duty includes the duties of honesty, good faith, obedience, and loyalty.

These Defendant General Partners contend that they did not breach any fiduciary duty as to the pipeline transaction, the G & A expenses, either in their allocation to OKC or in the amount incurred by OKC. They also deny that the loan to Trammell Crow violated any fiduciary duty to OKC.

In this case, you must determine whether the General Partners breached their duty to the Limited Partnership.

I will now instruct you as to certain standards you must apply in determining whether Cloyce Box and CKB & Associates breached their fiduciary duty.

You are instructed that a fiduciary is entitled to rely on the advice of experts, such as lawyers and accountants, in making business decisions so long as the fiduciary is acting reasonably and in good faith.

A fiduciary's duty as a general partner is limited by the scope of the partnership's business. As to property and business opportunities outside the scope of the partnership business, general partners owe no fiduciary duties and can acquire property and undertake business opportunities for their own benefit. Further, a fiduciary may profit personally from a transaction involving the partnership, so long as the profit is "incidental" to the interests of the partnership.

You are further instructed that a general partner is under no duty to the partnership to use his or her personal funds for the benefit of the partnership, or to put his or her personal assets at risk for the benefit of the partnership.

With regard to the pipeline transaction, you may also consider whether the Limited Partnership was financially unable to acquire an interest in the pipeline.

The standards for measuring a fiduciary's conduct and the burden of proof on issues depend upon whether the fiduciary was "interested" in connection with a particular transaction, or whether the fiduciary was "disinterested."

A general partner is an "interested" fiduciary when he:

1. Makes a personal profit from a transaction by dealing with the partnership or usurps a partnership opportunity; or

2. Buys assets of the partnership, or sells assets of the partnership to himself; or

3. Transacts business in his general partners's capacity with another entity with which he is significantly financially associated; or

4. Transacts business in his general partner's capacity with a family member.

If a fiduciary is not "interested," then he is considered to be "disinterested."

Defendant General Partners Cloyce K. Box and CKB & Associates, Inc., are interested fiduciaries with regard to the pipeline transaction and the allocation of general and administrative expenses.

For each transaction where these defendants are interested, the burden of proof is on them to prove that the transaction was fair and reasonable to the Limited Partnership at the time it was entered into.

These defendants are disinterested fiduciaries with regard to the G & A issue of the number of employees of CKB & Associates, Inc.

For each transaction where these defendants are disinterested, then the burden of proof is on Plaintiffs to prove that the transaction was tainted with fraud, or was willfully undertaken as a part of a scheme to overreach, or was beyond the scope of the fiduciary's authority.

For any transaction where the General Partners were "disinterested," you may also consider whether the conduct of the Defendant General Partners was based upon their honest business judgment with regard to the transaction. If they were disinterested, they are not subject to liability for business decisions that were unwise or imprudent unless the challenged transaction was tainted by fraud, or was willfully undertaken as part of a scheme to overreach, or was expressly contrary to the Partnership Agreement. However, this business judgment rule has no application where general partners are "interested" fiduciaries.

You are instructed that you must view all of the transactions in light of the circumstances existing at the time the transactions occurred.

**The Trammell Crow Loan**

It is for you to determine whether these General Partner defendants are interested or disinterested fiduciaries with regard to the Trammell Crow loan transaction.

With respect to the Trammell Crow loan, the Partnership Agreement prohibits loans to "Affiliates." As that term is defined in the Partnership Agreement, Trammell Crow *is not* an affiliate; however, Box Brothers Holding Company *is* an affiliate. Therefore, you must decide (1) whether the Trammell Crow loan constituted a single transaction whereby OKC merely loaned $2 million to Trammell Crow, in which case, these defendants would be disinterested fiduciaries, or (2) whether the Trammel Crow loan was part of the loan by Crow to Box Brothers

Holding Company, in which case these defendants would be interested fiduciaries.

As to each transaction in which Defendant General Partners were "disinterested" fiduciaries, Plaintiffs have the burden to prove, by a preponderance of the evidence, that Defendant Cloyce K. Box or CKB & Associates, or both, have breached their fiduciary duty. If Plaintiffs have satisfied that burden, you should find for Plaintiffs as to those transactions. Otherwise, you should find for Defendants as to those transactions.

As to each transaction in which Defendants were "interested" fiduciaries, Defendant General Partners have the burden to prove, by a preponderance of the evidence, that their actions in such transactions were fair and reasonable to the Partnership. If Defendants have satisfied that burden, you should find for Defendants as to those transactions. Otherwise, you should find for Plaintiffs as to those transactions.

* * *

**Section 7**

**Damages**

If Plaintiffs have proven a claim against Defendants by a preponderance of the evidence, you must determine the damages, if any, to which OKC Limited Partnership is entitled. You should not interpret the fact that I am giving instructions about damages as an indication in any way that I believe that OKC should, or should not, recover anything in this case. It is your task first to decide whether Defendants are liable. I am instructing you on damages only so that you will have guidance in the event

you decide that Defendants are liable and that OKC is entitled to recover money from Defendants.

You are instructed that the mere fact that the Partnership suffered some loss or damage does not in itself entitle it to recover damages. The only recoverable damages are those which are the natural, direct and proximate result of the claim of wrongful conduct. However, it is not necessary that the party against whom the claim is made contemplated or foresaw, at the time of the claimed wrongful conduct, the particular damages which may have resulted.

Damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in this case, that the act or omission played a substantial part in bringing about or actually causing the damage; and that the damage was either a direct result or a reasonably probable consequence. There may be more than one proximate cause of an event.

If you find that Defendants, or some of them, are liable to the Partnership, then you must determine an amount that is fair compensation for the Partnership's damages. These damages are called compensatory damages.

The damages you award, if any, must be fair compensation for the Partnership's damages, no more and no less. You should not award compensatory damages for speculative damages, but only for those injuries which the Partnership has actually suffered or that the Partnership is reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that Plaintiffs prove the amount of the Partnership losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

If you award damages, you must use sound discretion in fixing the amount, basing your award upon the evidence in the case. You may draw reasonable inferences where you find them warranted from the facts and circumstances in evidence.

You may impose damages on a claim solely upon the defendant or defendants that you find are liable on that claim. Although there are several defendants in this case, it does not necessarily follow that if one is liable, all or any of the others also are liable. Each defendant is entitled to fair, separate and individual consideration, without regard to your decision as to the other defendants. If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant.

You may find that more than one defendant is liable for a particular injury. If so, Plaintiffs are not required to establish how much of the injury was caused by each particular defendant whom you find liable. Thus, if you conclude that the defendants you find liable acted jointly, then you may treat them jointly for purposes of calculating damages. If you decide that two or more of the defendants are jointly liable on a particular claim, then

you may simply determine the overall amount of damages for which they are liable.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

A. *Damages Accrued.* If you find for Plaintiffs, the Partnership is entitled to recover an amount that will fairly compensate it for any damages it has suffered to date.

B. *Future Damages.* If you find that the Partnership is reasonably certain to suffer damages in the future, then you should award it an amount you believe would fairly compensate it for such future damages.

C. *Reduction of Future Damages to Present Value.* An award of future damages necessarily requires that payment be made now for a loss the Partnership will not actually suffer until some future date. If you should find that the Partnership is entitled to future damages, then you must determine the present value in dollars of such damages.

In arriving at the amount of any award, you may take into consideration the following elements:

1. The net amount of money that OKC would have retained and avoided paying, after deducting any expenses of operations and costs of ownership, if the pipeline had been owned by OKC or placed in a subsidiary owned by OKC rather than an affiliate of Cloyce Box.

2. Any amount of general and administrative expenses which were improperly paid by OKC as a result of any breach of contract, breach of implied covenant of

good faith and fair dealing, breach of fiduciary duty, or RICO violation.

In addition to actual or nominal damages, the law permits the jury, under certain circumstances, to award punitive damages to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct. You may award punitive damages if Plaintiffs have proved that Defendants breached a fiduciary duty *and* acted with malice or willfulness or with callous and reckless indifference. Persons act willfully or with reckless indifference to the rights of others when they act in disregard of a high probability of damage to another about which they know or which would be apparent to a reasonable person in their position.

If you determine that Defendants' conduct was so shocking and offensive as to justify an award of punitive damages, you may exercise your discretion to award those damages. In making any award of punitive damages, you should consider that the purpose of punitive damages is to punish a defendant for shocking conduct, and to deter Defendants and others from engaging in similar conduct in the future. The law does not require you to award punitive damages, however. If you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party, and the amount should be no more than you believe necessary to fulfill the purposes of punitive damages. You may consider the financial resources of a defendant in fixing the amount of

punitive damages, and you may impose punitive damages against one or more defendant, and not another, or against more than one defendant in different amounts.

You should consider the amount of damages, if any, as to each defendant with respect to each RICO claim separately and independently from the amount of damages, if any, you may have awarded with respect to other non-RICO claims.

**Question No. 1:**

Do you find from a preponderance of the evidence that the Defendant General Partners, Cloyce K. Box or CKB & Associates, Inc., breached the express provisions of the Partnership Agreement?

If your answer is "Yes" as to any defendant named in the transactions set out below, then, if you find by a preponderance of the evidence that the breach of the Partnership Agreement proximately caused injury to the OKC Limited Partnership, set out what amount of money, if any, would reasonably compensate OKC for its damages.

If any damages are assessed as to the pipeline transaction, state separately the amount which represents past and future damages.

| (a) Pipeline Transaction | | Past Damages | Future Damages |
|---|---|---|---|
| Cloyce K. Box | Yes _ No X | $_____ | $_____ |
| CKB & Associates | Yes _ No X | $_____ | $_____ |

(b) *General & Administrative Expenses*

Cloyce K. Box Yes _ No X $_____

CKB & Associates Yes _ No X $_____

(c) Trammell Crow Loan Transaction

Cloyce K. Box Yes X No _ $NONE

CKB & Associates Yes X No _ $NONE

Answer the next question.

**Question No. 2:**

Do you find from a preponderance of the evidence that Defendant General Partners, Cloyce K. Box or CKB & Associates, Inc., breached the implied covenant of good faith and fair dealing arising from the Partnership Agreement with OKC Limited Partnership?

If your answer is "Yes" as to any defendant named in the transactions set out below, then, if you find by a preponderance of the evidence that the breach of the implied covenant of good faith and fair dealing proximately caused injury to the OKC Limited Partnership, set out what amount of money, if any, would reasonably compensate OKC for its damages.

If any damages are assessed as to the pipeline transaction, state separately the amount which represents past and future damages.

| (a) Pipeline Transaction | Past Damages | Future Damages |
|---|---|---|
| Cloyce K. Box<br>Yes X No MB | $20,021,000 | $6,200,000 |
| CKB & Associates<br>Yes X No MB | $_____ | $_____ |
| | jointly liable | |

(b) General & Administrative Expenses

Cloyce K. Box
Yes X No MB $112,500

CKB & Associates
Yes X No MB $_____

jointly liable

(c) Trammell Crow Loan Transaction

Cloyce K. Box
Yes X No _ $NONE

CKB & Associates
Yes X No _ $NONE

Answer the next question.

**Question No. 3:**

Do you find from a preponderance of the evidence that the Defendant General Partners, Cloyce K. Box or CKB & Associates, Inc., breached any fiduciary duties owed to the OKC Limited Partnership?

If your answer is "Yes" as to any defendant named in the transactions set out below, then, if you find by a preponderance of the evidence that the breach of fiduciary duties proximately caused injury to the OKC Limited Partnership,

set out what amount of money, if any, would reasonably compensate OKC for its damages.

If any damages are assessed as to the pipeline transaction, state separately the amount which represents past and future damages.

| (a) Pipeline Transaction | Past Damages | Future Damages |
|---|---|---|
| Cloyce K. Box<br>Yes X No ___ | $20,021,000 | $6,200,000 |
| CKB & Associates<br>Yes X No ___ | $_____ | $_____ |
| | jointly liable | |

(b) General & Administrative Expenses

| | |
|---|---|
| Cloyce K. Box<br>Yes X No MB | $112,500 |
| CKB & Associates<br>Yes X No MB | $_____ |
| | jointly liable |

(c) Trammell Crow Loan Transaction

| | |
|---|---|
| Cloyce K. Box<br>Yes X No _ | $NONE |
| CKB & Associates<br>Yes X No _ | $NONE |

Answer the next question only if you have awarded damages in your answers to Question No. 3. Otherwise, proceed to Question No. 5.

**Question No. 4:**

Answer this question *only* if you have awarded damages in Question No. 3. Otherwise, proceed to Question No. 5.

On this question, Plaintiffs have the burden of proof by a preponderance of the evidence.

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence that OKC Limited Partnership is entitled to recover as punitive damages from any of the defendants below as a result of a breach of fiduciary duty?

Answer only as to any defendant or defendants against whom you have awarded compensatory damages in Question No. 3.

Answer in dollars and cents, if any, with respect to each party listed. If you do not award any punitive damages, answer "None."

**ANSWER:**

Cloyce K. Box $2,179,000.00

CKB & Associates $NONE

Proceed to Question No. 5.

* * *

## VERDICT FORM

We, the jury have answered the foregoing questions and return the same as our verdict in this case.

Signed this 29 day of OCTOBER, 1992.

/s/ Mark Brunner
PRESIDING JUROR

(2)

Supreme Court, U.S.
FILED
AUG 26 1996
CLERK

No. 96-173

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

B. R. GRIFFIN, DAVID H. HAWK, JAMES A. LYLE, HAYDEN McILROY and J. R. SIMPLOT,

*Petitioners,*

vs.

THOMAS D. BOX and DON D. BOX, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF CLOYCE K. BOX, CKB & ASSOCIATES, INC., CKB PETROLEUM, INC., BOX BROTHERS HOLDING COMPANY and OKC LIMITED PARTNERSHIP,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION

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*Of Counsel*

August 26, 1996

30 pp

## COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit erred in holding that the judgment of the district court should be reversed and remanded for a new trial because the jury's answers to the special interrogatories on petitioners' state law breach of contract, breach of fiduciary duty and punitive damages claims were irreconcilably inconsistent.

## RULE 29.6 STATEMENT

Respondent CKB & Associates, Inc. is a nonwholly owned subsidiary of respondent Box Brothers Holding Company.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

B.R. GRIFFIN, DAVID H. HAWK, JAMES A. LYLE, HAYDEN McILROY and J.R. SIMPLOT,

*Petitioners*,

-against-

THOMAS D. BOX and DON D. BOX, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF CLOYCE K. BOX, CKB & ASSOCIATES, INC., CKB PETROLEUM, INC., BOX BROTHERS HOLDING COMPANY and OKC LIMITED PARTNERSHIP,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

### STATEMENT OF THE CASE

Petitioners seek discretionary review from this Court of an unpublished decision rendered May 2, 1996 by the United States Court of Appeals for the Fifth Circuit that reversed and remanded for a new trial petitioners' state law claims for breaches of fiduciary duty and the OKC Limited Partnership Agreement by the General Partners of OKC Limited

Partnership on the ground that the jury's inconsistent verdicts on those claims conflicted irreconcilably. As petitioners' lengthy and convoluted statement of "facts" itself illustrates, the unanimous decision of the Fifth Circuit panel (Wisdom, Garwood and Jones, C.J.J.) is fact bound and turns on issues of Texas state law. It presents no important question of law appropriate for review by this Court.

**A. Factual and Procedural Background**

Since its inception, OKC Limited Partnership (the "Partnership") has owned an undivided 25 percent interest in an oil and gas lease covering South Pass Block 89 in the Gulf of Mexico off the coast of Louisiana. Prior to March 1985, the Partnership arranged to transport its oil production from Block 89 to a receiving station in Louisiana through an oil pipeline (the "Pipeline") owned, in part, by Marathon Oil Company ("Marathon") at a tariff of $2.75 per barrel.

In 1984, as a result of concerns regarding future access to the Pipeline, the Partnership made an offer to Marathon to purchase an interest in the Pipeline. After Marathon conditionally accepted that offer, the Partnership determined that it was unable to proceed with the transaction for several reasons, including its lack of expendable cash, inability to absorb the potential environmental liabilities associated with ownership of the Pipeline, contractual restrictions in a bank loan agreement, and its unwillingness to pledge its oil and gas reserves as security for potential liabilities. Rather than foregoing the opportunity to secure guaranteed access to the

Pipeline, however, the General Partners decided that CKB Petroleum, an affiliate of the General Partners, would purchase the Pipeline interest and dedicate its Pipeline capacity to the Partnership's exclusive use at the exact same tariff always charged by Marathon.

The Partnership assigned its rights under the asset purchase agreement with Marathon to CKB Petroleum and, on February 28, 1985, CKB Petroleum purchased the Pipeline interest from Marathon for $4,757,000 (the "Pipeline Transaction"). The following day, CKB Petroleum agreed to make available to the Partnership, for a twenty year period, all of CKB Petroleum's Pipeline capacity at the same $2.75 per barrel tariff the Partnership had always paid Marathon.

Petitioners, owners of units of interest in the Partnership,[1] commenced this action in November 1987 against the General Partners of the Partnership (Cloyce Box and CKB & Associates, Inc.) and two affiliates of the General Partners (CKB Petroleum and Box Brothers Holding Company). In their complaint, petitioners alleged, among other things, that the General Partners breached the OKC Limited Partnership Agreement (the "Partnership Agreement") and their fiduciary duties by causing CKB Petroleum and the Partnership to enter into the Pipeline

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[1] The Partnership dissolved and transferred its assets and liabilities to Box Energy Corporation in April 1992. At the time of trial, petitioners all owned Class B shares in Box Energy Corporation.

Transaction and by misallocating certain general and administrative expenses to the Partnership.

The case was tried in September and October 1992. In its instructions to the jury on the claim under Texas law for breach of the Partnership Agreement, the district court, at petitioners' request, focused the jury's attention on five separate provisions of the contract that petitioners contended were breached by the General Partners, including sections 3.03(a) and 3.05. (Petition ("Pet.") at A48).[2] As the court explained to the jury (*id.*), Section 3.03(a) of the Partnership Agreement prohibited the General Partners from entering into transactions with the Partnership that were not "fair and reasonable" and on terms "no less favorable" than the Partnership could have received a third party. (App. at 1). Furthermore, Section 3.05, as the jury was instructed (Pet. at A48), prohibited the General Partners from breaching their "fiduciary obligations" and engaging in "willful or wanton misconduct." (App. at 3).

The court likewise instructed the jury on petitioners' claims — also under Texas law — for breach of fiduciary duty and punitive damages. With respect to the fiduciary duty claim, the court advised the jury that it must find for the General Partners if they proved that the transactions "were fair and reasonable to the Partnership." (Pet. at A53).

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[2] Citations preceded by "Pet. at A" are to the Appendix to the Petition; citations preceded by "App." are to the appendix to this Brief in Opposition.

As to punitive damages, the jury was told that it could award such relief if it found that defendants engaged in "some extraordinary misconduct" that was "shocking and offensive," but only if "Plaintiffs have proved that Defendants breached a fiduciary duty *and* acted with malice or willfulness or with callous and reckless indifference." (Pet. at A57) (emphasis in original).

Pursuant to Rule 49(a), Fed. R. Civ. P., the jury was provided with a special verdict form containing a separate interrogatory for each of petitioners' claims. In response to Question 1 on the verdict form, the jury found no breach of the Partnership Agreement. (Pet. at A58-59). The jury thus found that the transactions at issue were neither unfair nor unreasonable and that the General Partners did not breach their fiduciary duties. In response to Question 3, however, the jury inexplicably found that the General Partners did breach their fiduciary duties and, therefore, that the transactions were unfair or unreasonable. (Pet. at A60-61). In Question 4 the jury again found a breach of fiduciary duty and declared the General Partners' conduct to be so "shocking and offensive" that it warranted punitive damages. (Pet. at A62).

**B. Course of Proceedings**

On March 9, 1994 — about sixteen months after the verdict — the District Court entered judgment for petitioners on the breach of fiduciary duty and punitive damages claims, rejecting respondents' objections to the glaring

inconsistencies in the jury's verdict. The District Court amended its judgment on October 6, 1994 in certain respects not relevant to this Petition.

On May 2, 1996, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court and ordered a new trial on petitioners' Texas state law claims for breach of the Partnership Agreement, breach of fiduciary duty and punitive damages. (Pet. at A18-19). The Court of Appeals was unable to find any "satisfactory interpretation" of the jury's answers that could reconcile the obvious inconsistencies in the jury's findings on petitioners' claims for breach of the Partnership Agreement and breach of fiduciary duty. The Fifth Circuit also held that, on the record below, the jury's rejection of the state law breach of contract claim simply could not "be squared" with its punitive damages award under Texas law.

## SUMMARY OF THE ARGUMENT

The Petition presents no issue worthy of this Court's review. The Fifth Circuit applied the standard established by this Court, and followed in every circuit, when evaluating conflicts in answers to jury interrogatories. The application of that well-established standard by the Court of Appeals turned upon the plain meaning of the Partnership Agreement, the instructions given to the jury, and the court's interpretation of governing Texas law. The Petition, therefore, involves no conflict with the decisions of this Court or the other courts of appeal and, indeed, presents *no*

issue of federal law at all. Thus, petitioners have plainly failed to establish any "compelling reasons" for granting the writ and the Petition should be denied. Sup. Ct. Rule 10.

The Fifth Circuit's decision was, in any event, clearly correct and completely consistent with the decisions of other courts of appeals in cases involving inconsistent verdicts. The jury's factual findings in its answers to the special interrogatories are in direct conflict and, as the Fifth Circuit held, cannot be reconciled under any circumstances.

## ARGUMENT

### I.
### THE PETITION PRESENTS NO COMPELLING QUESTION OR CONFLICT AMONG THE CIRCUITS FOR THIS COURT'S REVIEW

#### A. The Fifth Circuit Applied the Correct Legal Standards When Evaluating the Jury's Inconsistent Verdict.

As the Petition concedes (*see* Pet. at 9 n.2), the Fifth Circuit, and every other Circuit, has long recognized the duty of a reviewing court, established by this Court in *Atlantic & Gulf Stevedores* v. *Ellenberg Lines, Ltd.*, 369 U.S. 355, 364 (1962), to resolve, where possible, any inconsistencies in the jury's verdict. Although the Petition suggests that the Court below failed to appreciate this obligation when considering the jury's answers to the special interrogatories (Pet. at 10), the text of the opinion clearly demonstrates that the Fifth Circuit attempted — in vain — to find a basis to reconcile the jury's conflicting answers. The

Court stated:

> The Seventh Amendment requires that courts make a concerted effort to reconcile apparent inconsistencies in a jury's response to special interrogatories. *Mercer* v. *Long Mfg. N.C., Inc.*, 665 F.2d 61, 66 (5th Cir. 1982). When a jury's answers appear to be in conflict, "the reviewing court's duty is to reconcile the conflicts if possible in order to validate the jury's verdict." *FDIC* v. *Munn*, 804 F.2d 860, 866 (5th Cir. 1986). The touchstone inquiry for reconciliation is whether "the answers may be said to represent a logical and probable decision on the relevant issues submitted." *Munn*, 804 F.2d at 866.

(Pet. at A18). "After a careful examination of the record," the Fifth Circuit was unable to find a view of the case that could conceivably reconcile the jury's inconsistent verdict. (Pet. at A19).

The Fifth Circuit, therefore, did not create a rule of law that is at odds with the decisions of this Court or the other circuit courts. Sup. Ct. Rules 10(a) & (c). At most, the Petition claims that the Fifth Circuit misapplied the *correct* rule of law when reaching its decision; such a claim is "rarely" an appropriate ground for exercising this Court's discretionary jurisdiction. Sup. Ct. Rule 10. Furthermore, since, as set forth below, the application of this proper statement of federal law turned upon issues of Texas state law, the Petition clearly presents no occasion for

discretionary review by this Court.

### B. The Fifth Circuit's Decision is Fact Bound and Turns Only on Questions of State Law.

Despite petitioners' attempt to manufacture a federal constitutional question out of the Fifth Circuit's decision on their state law breach of contract and breach of fiduciary duty claims, the Petition clearly presents no question of federal law. The unpublished decision of the Fifth Circuit has no significance beyond the unique factual circumstances of this case.

As set forth above, the Fifth Circuit was fully aware of its duty under federal law to harmonize, where possible, the jury's answers to special interrogatories. That court found, however, that the jury's answers were hopelessly irreconcilable because facts essential to sustaining petitioners' breach of fiduciary duty and punitive damages claims under *Texas* law were necessarily rejected by the jury when it found no breach of the express terms of the Partnership Agreement. (Pet. at A19). In seeking review from this Court of that decision by the Fifth Circuit, therefore, petitioners present *no* question of federal law. *See*, *e.g.*, *Denny* v. *Ford Motor Co.*, 42 F.3d 106, 111-12 (2d Cir. 1994) (certifying question to the New York Court of Appeals regarding whether conflicting verdicts on two product liability theories were reconcilable); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 871 F.2d 1368, 1374 (8th Cir. 1988) (inconsistencies between negligence and fraud verdict controlled by state law); *Mercado* v. *Ahem*, 974 F.2d

863, 866 (7th Cir. 1992) (same).

Petitioners' challenge to the Fifth Circuit's interpretation of Texas law and its application to the facts herein thus presents no issue worthy of this Court's review. Sup. Ct. R. 10. The settled "practice [of this Court is] to accept a reasonable construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion'." *Haring* v. *Prosise*, 462 U.S. 306, 314 n. 8 (1983) (quoting *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976)). For example, in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), this Court declined to review the interpretation given to Kansas law by the Court of Appeals after concluding that the lower court decided correctly that the statute of limitations issue presented on appeal was controlled by state, not federal, law.[3] *Id.* at 534.

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[3] In *Ragan*, as here, the Court of Appeals had reversed the judgment of the district court on an issue of state law. This Court declined to review the court of appeals' decision, believing that it was ill-suited to reevaluate a decision based upon Kansas law and written by a judge who was "a distinguished member of the Kansas bar." *Ragan*, 337 U.S. at 534. Here, Judge Edith Jones, the author of the opinion, was a distinguished member of the Texas bar prior to her appointment to the Court of Appeals and Judge Will Garwood, another member of the Panel, was an Associate Justice of the Texas Supreme Court prior to his appointment to the Court of Appeals. The third member of the Panel, Judge John Wisdom, has been a member of the Fifth Circuit for nearly forty years. *See* 2 Almanac of the Federal Judiciary, Fifth Circuit at 8-20 (1996).

Here, Texas law controls the issue as to whether the jury's conflicting answers to the interrogatories can be reconciled. Consistent with this Court's "practice" of deferring to the courts of appeals when state law is determinative, the Petition presents no occasion for this Court to exercise its discretionary jurisdiction to review the well-reasoned decision of the Fifth Circuit. *See Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963) (dismissing writ of certiorari as improvidently granted after Court determined that the issues raised were controlled by Pennsylvania law).

The Petition also seeks improperly to have this Court review the voluminous factual record developed in the district court[4] in order to locate some view of the evidence that might be used to reconcile the jury's inconsistent findings. This Court does not, however, "grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). Regardless of whether "the evidence or inferences drawn from it" could somehow explain the inconsistencies in the verdict, the Petition presents no important question of law and "[g]ranting of the writ would not be warranted." *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U.S. 175, 178 (1938).

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[4] The district court's docket contains nearly 1,360 entries. The trial transcript alone comprises more than 4,000 pages and there are over 225 exhibits in evidence.

## II.
## THE FIFTH CIRCUIT WAS CLEARLY CORRECT IN DECLARING THE JURY'S ANSWERS IRRECONCILABLE

Even if this were an appropriate case for granting a writ of certiorari — and it is not — the Petition nevertheless presents no compelling reason to exercise this Court's jurisdiction because the decision of the Fifth Circuit was plainly correct. Much of the Petition's arguments are based upon the erroneous proposition that the answers to each *claim* presented to the jury must be viewed in isolation. (*See* Pet. at 10, 14). Instead, as this Court has made clear, the Seventh Amendment requires that the jury's answers as a whole be consistent with each other in order to support a judgment on any claim. *See Atlantic & Gulf Stevedores*, 369 U.S. at 364 (comparing jury's answers to plaintiff's negligence claims and defendant's third-party breach of contract claim); *see also Bonin* v. *Tour West, Inc.*, 896 F.2d 1260, 1263 (10th Cir. 1990) ("answers . . . must be read together to arrive at the appropriate judgment"). Because the jury's conflicting interrogatory answers cannot be reconciled under any view of the record developed at trial, the Fifth Circuit was clearly correct in ordering a new trial.

The Petition does not even attempt to refute the undeniable conflict between the jury's finding in Question 1 — that there was *no* breach of Section 3.05 of the Partnership Agreement (prohibiting the General Partners from breaching their fiduciary duties) — and its findings in

both Question 3 and Question 4 that the General Partners had breached their fiduciary duties. Petitioners' only argument in support of the verdict, which is illogical and in any event was never raised below,[5] is that Section 3.05 of the contract "is not a section of the agreement that can actually be breached." (Pet. at 11).

The jury, however, was instructed otherwise. *At petitioners' request*, the district court told the jury that it could find liability if the General Partners breached any provision of the Partnership Agreement, including any "[v]iolation of Section 3.05 prohibiting General Partners from breaching their fiduciary obligations and engaging in willful or wanton misconduct." (Pet. at A48). "[T]he consistency of the jury verdicts must be considered in light of the judge's instructions to the jury." *Bates* v. *Jean*, 745 F.2d 1146, 1151 (7th Cir. 1984) (citing *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 118-22 (1963)). Under the instructions given by the district court, a breach of fiduciary duty by the General Partners was itself a breach of the Partnership Agreement. Thus, the jury found no breach of

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[5] This Court's "normal practice" is to "refrain from addressing issues not raised in the Court of Appeals." *EEOC* v. *Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Since this Court would not "reach or resolve" contentions petitioners failed to raise below if the writ of certiorari were granted, there is even less reason to consider them here. *Id.* (dismissing the writ of certiorari as improvidently granted where based upon issues not raised below); *see Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981) (arguments not raised below "not properly before" this Court).

fiduciary duty by finding no breach of the Partnership Agreement in response to Question 1. The jury's subsequent determination in response to Question 3 — that the General Partners breached their fiduciary duties — cannot be reconciled under any circumstances.

The Fifth Circuit also concluded correctly that the jury's inconsistent verdict with respect to Section 3.03(a) of the Partnership Agreement required a new trial. By its terms, Section 3.03(a) prohibits the General Partners from transacting any business with the Partnership unless the transaction is "fair and reasonable" and on terms "no less favorable" than could be obtained from third parties. Despite finding that the Pipeline Transaction was fair and reasonable in Question 1, the jury inexplicably found that the same transaction was unfair or unreasonable when responding to Question 3 and, moreover, "shocking and offensive" in its answer to Question 4. (Pet. at A57).

Petitioners' feeble attempts to reconcile the obvious inconsistencies in the jury's finding with respect to Section 3.03(a) of the Partnership Agreement were properly rejected. First, the Petition overlooks the jury's finding on the punitive damages question when attempting to reconcile the jury's answers. The jury was instructed that it could award punitive damages only if petitioners proved that the General Partners "breached a fiduciary duty *and* acted with malice, willfulness or callous and reckless indifference." (Pet. at A57) (emphasis in original). Courts of Appeals have consistently held, as did the Fifth Circuit below (Pet. at

A19), that a jury's finding of malicious or willful conduct is "plainly contradicted" by a jury verdict finding that same conduct to be reasonable. *Finnegan* v. *Fountain*, 915 F.2d 817, 820 (2d Cir. 1990); *see Jefferies* v. *Harleston*, 52 F.3d 9, 13-14 (2d Cir. 1995) (same); *Bates*, 745 F.2d at 1152 (same).

Second, petitioners ignore the plain meaning of the Partnership Agreement and argue that the jury could have found no breach of that agreement simply by concluding that the terms of the transaction were the same or better than that which the Partnership could have obtained from third parties. (Pet. at 11-12). The requirements of Section 3.03, however, are not disjunctive; the Partnership Agreement would be breached by any transaction that was *either* unfair, unreasonable *or* on terms less favorable than could be obtained from third parties. (*See* App. at 2-3). Thus, since the jury had to conclude that the Pipeline Transaction was *neither* unfair nor unreasonable when finding no breach of the Partnership Agreement, the Fifth Circuit committed no error in holding that the same transaction could not constitute a breach of the General Partner's fiduciary duties under Texas law.[6]

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[6] Petitioners also assert disingenuously that the jury could have concluded that the Partnership Agreement did not apply to the Pipeline Transaction because the Partnership "was not a party to the conveyance." (Pet. at 12). Although this argument too was never raised in the Court of

(continued...)

Petitioners' only other argument, based upon the different burdens of proof applicable to petitioners' breach of duty and breach of contract claims (Pet. at 12), was also properly rejected. The burden of proof applicable to each claim has no relevance here. Because the jury was instructed only once as to the proof necessary to establish a breach of fiduciary duty, it necessarily incorporated that standard in its other answers. *Cf. Andrasko* v. *Chamberlain Mfg. Corp.*, 608 F.2d 944, 946-47 (3d Cir. 1979) (different burdens of proof cannot justify finding that defendant gave adequate warning but plaintiff did not assume the risk of injury). The shifting burden of proof imposed upon petitioners and respondents with respect to the claimed breach of fiduciary duty therefore was identical under both Question 1 and Question 3.

In any event, petitioners once again ignore the jury's findings underlying the punitive damages award, which the Fifth Circuit held could not "be squared with" the "jury's rejection of a breach of contract" on the facts of this case.

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[6](...continued)
Appeals (*see* note 5, *supra*), it is, in any event, meritless. As the Petition's recitation of facts makes clear (Pet. at 5), the sequence of events challenged in the complaint by petitioners was the "assign[ment by the General Partners] of OKC's rights under the Asset Purchase Agreement to CKB Petroleum" and the General Partners' efforts to "cause[] OKC to enter into a transportation agreement with CKB Petroleum for 20 years." Under any view of the facts of this case, OKC was a "party" to the transactions at issue and, therefore, Section 3.03 of the Partnership Agreement clearly applied.

(Pet. at A19). Under Texas law, as the district court instructed the jury (Pet. at A57), plaintiff bears the burden of proving each element of a punitive damages claim. *See Transportation Ins. Co.* v. *Moriel*, 879 S.W.2d 10, 18-19 (Tex. 1994). The jury's answers, therefore, cannot be explained by any difference in the burdens of proof because petitioners had the burden of proof in both the punitive damages and the breach of fiduciary duty claims. Thus, the Fifth Circuit found correctly that it was impossible to reconcile the jury's finding in Question 4 that the General Partners committed a shocking and offensive breach of fiduciary duty with its finding in Question 1 that the conduct challenged in the complaint was fair and reasonable and did not breach any fiduciary duties. (Pet. at A19).

* * *

In sum, the Fifth Circuit concluded correctly that the jury's interrogatory answers could not be reconciled. Any other conclusion would ignore the jury's finding that there was no breach of the Partnership Agreement, in violation of *respondents*' Seventh Amendment rights. "[I]n dealing with jury responses that are inconsistent, proper deference to the parties' Seventh Amendment rights to a jury trial precludes entry of a judgment that disregards any material jury finding." *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 428 (2d Cir. 1995). Here, the Fifth Circuit's determination that the jury's verdict was irreconcilable in light of the applicable Texas law, the jury instructions given, and the record below was eminently reasonable, and presents no occasion for

discretionary review by this Court.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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SULLIVAN & CROMWELL
*Of Counsel*

August 26, 1996

## APPENDIX

## AMENDED AND RESTATED CERTIFICATE AND ARTICLES OF LIMITED PARTNERSHIP OF OKC LIMITED PARTNERSHIP

*[Excerpts]*

THIS AGREEMENT made and entered into as of the 12th day of May, 1981, by and among CKB & Associates, Inc., a Texas corporation ("Associates"), and Cloyce K. Box, an individual residing in Dallas, Texas ("Box"), as General Partners, and OKC Corp., a Delaware corporation ("OKC"), as Limited Partner, for the purpose of amending and restating in their entirety the Articles of Limited Partnership of OKC Limited Partnership, a Texas limited partnership, as filed in the Office of the Secretary of State for the States of Texas and Louisiana on May 11, 1981.

* * * *

3.03. *Limitations on General Partners.* Notwithstanding any other provisions of this Agreement, the following prohibitions, restrictions and requirements shall be applicable:

(a) An Affiliate may enter into contracts with the Partnership as operator, seller or purchaser of properties or services, or in other capacities, so long as the transactions are fair and reasonable to the Partnership and the terms of any contract or conveyance are no less favorable to the Partnership than those which could be

obtained from Unrelated Persons.

(b) The Partnership shall not require any Lease or other oil and gas interest or otherwise engage in any exploratory operations outside the Area of Interest, or make any other investment not in furtherance of the purposes of the Partnership.

(c) The Partnership shall not sell all or any part of a Lease to an Affiliate without the prior consent of a Majority in Interest of the Limited Partners.

(d) No Affiliate shall render to the Partnership any oil field equipage, or drilling services or sell or lease to the Partnership any equipment or related supplies unless (i) if such Person is engaged, independently of the Partnership and as an ordinary ongoing business, in the business of providing such services or selling or leasing such items to a substantial extent to other Persons in the oil and gas industry in addition to partnerships in which such Person has an interest, the compensation, price or rental therefor is competitive with rates and prices charged by other Persons in the area engaged in the business of providing comparable services or items that could reasonably be made available to the Partnership or (ii) if such Person is not engaged in such a business, the compensation, price or rental therefor is the Affiliate's cost of such services, equipment or supplies or the competitive rate that could be obtained in the area, whichever is less. The Partnership shall not enter into any turnkey drilling contract with any Affiliate.

(e) Any services for which an Affiliate is to receive compensation from the Partnership shall be precisely described in a written contract which also specifies all compensation to be paid.

(f) The General Partners shall not permit the Partnership to do business in any jurisdiction or political subdivision in which the General Partners and the Partnership have not previously taken such steps as may be necessary to assure for the Limited Partners substantially the same limited liability as is provided for limited partners in limited partnerships formed under the Texas Uniform Limited Partnership Act.

(g) No loans may be made by the Partnership to any Affiliate.

(h) A creditor who makes a Non-Recourse Loan to the Partnership shall not have or acquire, at any time as a result of making the Loan, any direct or indirect interest in the profits, capital or property of the Partnership, other than as a secured creditor.

* * * *

3.05. *Liability of General Partners.* No General Partner, nor any shareholder, director, officer, employee or agent of a General Partner, shall be liable to the Partnership or to the Partners for losses sustained or liabilities incurred as a result of any act or omission which such General Partner in good faith reasonably believed to be in, or not opposed to, the best interests of the Partnership, unless such

act or omission constituted negligence, willful or wanton misconduct or breach of such General Partner's fiduciary obligations to the Limited Partners. A General Partner may rely upon, and shall have no liability to the other Partners or to the Partnership if it relies upon, the opinion of the Partnership's independent public accountants with respect to any matter relating to computations and determinations which affect allocations as provided in Article VI or Distributions as provided in Article VII.

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